11 U.S.C. § 549(a)
11 U.S.C. § 544
Subrogation
Equitable subrogation

Roost v. Western Cascade Federal Credit Union
Dist. Ct. # 00-6233-HO
Bankruptcy Adv. # 99-6109-aer
In Re Tew Bankruptcy Main Case # 698-65985-aer7

9/28/00 District Court (Hogan) (affirming Radcliffe)

Unpublished*

Defendant refinanced a vehicle loan. The original lender had physical possession of the title and was noted thereon as a secured party. Defendant required delivery of the title from the original lender (with the original lender's security interest released thereon) before its payoff check could be negotiated. Debtors filed bankruptcy before the check was negotiated and title sent to Defendant. Defendant perfected its own security interest postpetition without relief from stay, and outside of any relation-back period. Trustee sought avoidance of the security interest. Defendant sought to be equitably subrogated to the original lender's position.

The Bankruptcy Court held for Defendant on summary judgment:

Affirmed on appeal: Equitable subrogation, whereby Defendant would be substituted to the rights held by the original lender, to protect it against intervening lienholders (here the Trustee using his strong-arm powers) was appropriate under the facts. Defendant was excusably neglectful in failing to timely perfect. The transaction was conducted in accordance with ordinary business practices. Defendant attempted to protect itself by requiring delivery of the title before the check was negotiated. Allowing subrogation did not put the Trustee in a worse position had the original lender not been paid. The original lender had a perfected security interest, and the debt secured thereby had not been satisfied as of the petition date, as defendant's check had not yet been negotiated. On balance, the equities favored subrogation.

*On occasion the Court will decide to publish an opinion after its initial entry (and after submission of this summary). Please check for possible publication in WESTLAW, West's Bankruptcy Reporter, etc.

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CLERK, U.S. DISTRICT COURT
DISTRICT OF OREGON
EUGENE, OREGON

BY _____

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF OREGON

In re: SHAWN R. and KATIE M. TEW, Debtors.	Case No. 00-6233-HO ORDER
ERIC R.-T. ROOST, Trustee, Appellant, v. WESTERN CASCADE FEDERAL CREDIT UNION, Appellee.	

The Trustee appeals from the order granting Western Cascade's (Western) motion for summary judgment and denying the Trustee's motion for summary judgment. The Trustee sought to avoid the lien

E00-11(11)

asserted by Western in debtors' vehicle. On cross-motions for summary judgment, the bankruptcy court concluded that Western may substitute in the place of WFS Financial, Inc. (WFS) and its prior perfected lien.

STANDARD

The bankruptcy court's findings of fact shall not be set aside unless clearly erroneous. Fed. R. Bankr. P. § 8013. Issues of law are reviewed *de novo*. U.S. v. Horowitz, 756 F.2d 1400, 1403 (9th Cir. 1985). The standards regarding summary judgment found in Fed. R. Civ. P. 56 are made applicable to bankruptcy proceedings by Fed. R. Bankr. P. 7056.

Summary judgment is appropriate where "there is no genuine issue as to any material fact and . . . the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(c). The initial burden is on the moving party to point out the absence of any genuine issue of material fact. Once the initial burden is satisfied, the burden shifts to the opponent to demonstrate through the production of probative evidence that there remains an issue of fact to be tried. Celotex Corp. v. Catrett, 477 U.S. 317, 323 (1986). Rule 56(c) mandates the entry of summary judgment against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial. In such a situation, there can be "no genuine issue as to any material

fact," since a complete failure of proof concerning an essential element of the nonmoving party's case necessarily renders all other facts immaterial. The moving party is "entitled to a judgment as a matter of law" because the nonmoving party has failed to make a sufficient showing on an essential element of her case with respect to which she has the burden of proof. Id. at 32. There is also no genuine issue of fact if, on the record taken as a whole, a rational trier of fact could not find in favor of the party opposing the motion. Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 586, 106 S.Ct. 1348, 1355 (1986); Taylor v. List, 880 F.2d 1040 (9th Cir. 1989).

On a motion for summary judgment, all reasonable doubt as to the existence of a genuine issue of fact should be resolved against the moving party. Hector v. Wiens, 533 F.2d 429, 432 (9th Cir. 1976). The inferences drawn from the underlying facts must be viewed in the light most favorable to the party opposing the motion. Valadingham v. Bojorquez, 866 F.2d 1135, 1137 (9th Cir. 1989). Where different ultimate inferences may be drawn, summary judgment is inappropriate. Sankovich v. Insurance Co. of North America, 638 F.2d 136, 140 (9th Cir. 1981).

FACTUAL BACKGROUND

The facts are not disputed.

On September 29, 1998, the debtors borrowed $15,143.54 from Western to refinance a loan from WFS secured by a 1998 Mazda

possessed by the debtors. On that same day, Western issued a check in the amount of $15,143.54 to pay off the WFS loan. On the back of the check were the words

> Endorsement of this check constitutes our unconditional guarantee to submit within 10 days from the date of this endorsement to the Oregon M.V.D. appropriate application to name Western Cascade Federal Credit Union P.O. Box 2070 Roseburg, Oregon 97470 first security interest holder on the certificate of title of the following vehicle 98 Mazda Protege Ser. No. JM1BC1418W0221685. Failure to make application as guaranteed entitles Credit Union to liquidated damages in the face amount of this check plus attorneys fees incurred.

Appendix to Appellant's Brief (#40) at p. A-38.

On October 8, 1998, the debtors filed a bankruptcy petition.

WFS endorsed and negotiated the check on October 20, 1998. On October 23, 1998, WFS signed the certificate of title on the line below the notation of WFS Financial, Inc. as the security interest holder. Subsequently, Western sent the application for title to the Oregon Department of Motor Vehicles showing Western as the secured creditor. The Department noted the application for title whereby Western sought to perfect its security interest on October 28, 1998. Western did not seek or obtain relief from the automatic stay before its name was entered as the secured creditor by the Department of Motor Vehicles on the certificate of title.

DISCUSSION

Section 549(a) of Title 11 of the United States Code provides:

> (a) Except as provided in subsection (b) or (c) of this section, the trustee may avoid a transfer of property of the estate--

(1) that occurs after the commencement of the case; and

(2)(A) that is authorized only under section 303(f) or 542(c) of this title; or

(B) that is not authorized under this title or by the court.[1]

The code specifically refers to retention of title as a security interest in the definition of "transfer." 11 U.S.C. § 101(54). Property of the estate includes all legal and equitable interests of the debtor in property at the time of commencement of the case and that the estate acquires after the commencement of the case. 11 U.S.C. § 541(a)(1) and (a)(7). Upon the filing of a bankruptcy petition, all creditors are prohibited from any act to create, perfect, or enforce any lien against property of the estate. 11 U.S.C. § 362(a)(4). A security interest in a vehicle can only be perfected by application for notation of the security interest on the certificate of title. ORS § 803.097(1) and (3).

In this case, Western sought to perfect its security interest in the vehicle after commencement of the bankruptcy. The bankruptcy court did not grant any relief from the stay to permit Western to perfect its security interest by applying for notation of the interest on the title. However, the code does allow post-petition perfection of pre-petition security interest under certain circumstances and thus averting the Trustees avoidance powers.

The filing of a petition ... does not operate as a stay ... of any act to perfect, or to maintain or continue the

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[1]Subsections b (involuntary proceedings) and c (real property) are not applicable in this case.

> perfection of, an interest in property to the extent that the trustee's rights and powers are subject to such perfection under section 546(b) of this title or to the extent that such act is accomplished within the period provided under section 547(e)(2)(A) of this title.

11 U.S.C. § 362(b)(3).

> The rights and powers of a trustee under sections 544, 545, and 549 of this title are subject to any generally applicable law that--
>
> (A) permits perfection of an interest in property to be effective against an entity that acquires rights in such property before the date of perfection; or
>
> (B) provides for the maintenance or continuation of perfection of an interest in property to be effective against an entity that acquires rights in such property before the date on which action is taken to effect such maintenance or continuation.

11 U.S.C. § 546(b)(1).

Western argues that the doctrine of subrogation under Oregon law is incorporated into the bankruptcy code through 11 U.S.C. § 546(b) and operates to preclude the Trustee's avoidance powers in this case. In the alternative, Western contends that if the lien is avoided under section 549, the trustee can not avoid the lien created in favor of WFS, which Western argues it can assert by virtue of subrogation. In either case, Western must demonstrate the applicability of equitable subrogation.

The bankruptcy court referred to In re Allen, 32 B.R. 93, 95 (Bankr.D.Or. 1983) in finding in favor of Western on the issue of subrogation. There the court stated:

> A person who advances money to discharge a prior lien on real or personal property and takes a new mortgage as security will be subrogated under Oregon law to the prior lien as against the holder of an intervening lien of which he was excusably ignorant. Payment of the prior

> lien cannot bar subrogation because it is the payment which triggers the subrogation. Metropolitan Life Ins. Co. v. Craven, 164 Or. 274, 101 P.2d 237 (1940). A person who pays a debt of another for reasons of self interest is not a volunteer under Oregon law even though he did not act under legal obligation. Hult v. Ebinger, 222 Or. 169, 352 P.2d 583, 590-94 (1960). This circuit applies subrogation liberally in favor of a lender who pays an obligation of another, provided that the entire transaction places no innocent third party in a position more unfavorable than that in which he would have originally stood. United States v. Halton Tractor Co., 258 F.2d 612 (9th Cir.1958). C.I.M. International v. United States, 641 F.2d 671, 676-78 (9th Cir.1980). See also Potter v. United States, 111 F.Supp. 585, 588 (D.R.I.1953).

The Bankruptcy court in this case found, referring to In re Smith, 88 B.R. 297 (Bankr.D.Or. 1988), that the purpose of the rule is to prevent unjust enrichment and to protect the refinancing lender's expectation that by paying off the prior lien it is getting clear title. The rule recognizes that the intervening lienor is not prejudiced because it is in exactly the same position it would have been had the senior lien not been paid off.

The court subsequently found that the Trustee is the intervening lienor and subrogation should be applied because the entire transaction did not place the Trustee in a position more unfavorable than he would have stood had the payment to WFS not occurred.

One, advancing money to discharge a prior lien on real or personal property and taking a new mortgage as security, is held to be entitled to subrogation to the prior lien as against the holder of an intervening lien of which he was excusably ignorant.

Metropolitan Life Ins. Co. v. Craven, 164 Or. 274, 279 (1940). The doctrine of equitable subrogation does not apply unless the lender proves that it was ignorant of the existence of the intervening lien and that its ignorance was not a result of inexcusable negligence. Dimeo v. Gesik, 164 Or.App. 567, 571 (1999)

Generally, the doctrine is applied in cases in which a loan is made to discharge a debt secured by a piece of property in return for a security interest in that property and another lien is placed on the property before the second loan is advanced. The facts of this case are quite different. Here, WFS held a security interest in the vehicle owned by the debtors. Western refinanced the loan and in return asked WFS to apply to the Department of Motor Vehicles to name Western as the first security interest on the title. After Western entered into the security interest agreement with the debtors, the debtors filed for bankruptcy. At this point, the Trustee's avoidance power generally cuts off any further ability to perfect a security interest. This is not a case in which a lien is obtained, a subsequent junior lien is obtained and then a third creditor pays off the senior lien.

For purposes of section 549, Western could have had the priority relate back to September 29, 1998 (the date the security interest was created), by ensuring that its interest was perfected within 10 days of that date. See 11 U.S.C. § 547(e)(2)(A) (transfer takes effect if the transfer is perfected at or within 10 days after the transfer). Western attempted to perfect within this time frame by

relying on WFS, but WFS could comply with the endorsement provision without guaranteeing perfection within 10 days.[2] Additionally, the application to the DMV also requires the signatures of the debtors. Western could have attempted to secure WFS' cooperation in obtaining the certificate of title before it entered into the security agreement and made out the check to WFS.

Because Western could have perfected its interest in a period that would not run afoul of the bankruptcy stay, the issue is whether its failure to do so is excusable neglect. See Dimeo, 164 Or.App. at 571 (ignorance of intervening lien may not be the result of inexcusable negligence). Western argues that the transaction was conducted in accordance with the procedure which is most widely employed in the motor vehicle financing industry. The trustee argues that Western should have used an escrow agent to complete the transaction; paying the loan proceeds into escrow with instructions to the escrow agent to release the funds only when WFS had delivered the certificate of title into escrow. The only evidence in the record below is Western's interrogatory response stating that such a process is not commercially feasible.

The record does not demonstrate that Western's actions were unreasonable. Western did attempt to protected itself from subsequent lienors. This case is unusual in that it is the

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[2]For instance, WFS could wait for a time before endorsing the check and submit the application within 10 days of the endorsement but more than 10 days after the security interest was created on September 29, 1998. Indeed, this is what happened.

bankruptcy trustee who is the "intervening lienor." Because Western required delivery of the title from Western as a condition to WFS negotiating the check, it ensured that subsequent creditors could not obtain a priority over its interest.[3]

Allowing Western the ability to subrogate to WFS's security interest would not result in an injustice to those having equal equities See Ochoco Lumber Co. v. Fibrex & Shipping Co. Inc., 164 Or. App. 769, 775 (2000) (equitable subrogation will not be enforced where it will work injustice to those having equal equities). Had Western not refinanced the debt it is clear that the Trustee would not have been able to avoid the security interest in the debtors' vehicle. But for the somewhat sloppy method employed by Western, it too could have escaped the Trustee's avoidance powers by having the transfer relate back to September 29, 1998. Allowing Western to subrogate to WFS's position does not put the trustee in a worse position had WFS not been paid. As the bankruptcy court found, the transaction did not prejudice the bankruptcy estate. Indeed, on the date the petition was filed WFS still held a security interest in the car as it had not yet negotiated the check. As of that date, no other creditors would have had an ability to seek payment through liquidation of the vehicle. The equities in this case favor subrogation.

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[3]As noted above, the exclusive means to perfect a security interest in an automobile is to have that interest noted on the title with the DMV. ORS. 803.097(1) and (3).

Accordingly, the bankruptcy court correctly determined that Western is entitled to equitable subrogation and to assert a priority in the debtors' vehicle.

CONCLUSION

For the reasons stated above, the bankruptcy court's decision is affirmed.

DATED this 28th day of September, 2000.

Michael R. Hogan
United States District Judge

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF OREGON

ERIC R ROOST

Appellant,

v.

Civil No. 00-6233-HO

WESTERN CASCADE FEDERAL CREDIT UNION

USBC 99-6109aer

Appellee.

JUDGMENT

The decision of the bankruptcy court is affirmed.

Dated: September 29, 2002000.

Donald M. Cinnamond, Clerk

by

Lea Force, Deputy

JUDGMENT **DOCUMENT NO: _____**