United States Bankruptcy Court
Western District of Wisconsin

Cite as: [Unpublished]

Gary L. Stanton, Plaintiff, v.
Robert R. Reddick, Defendant
(In re Robert R. Reddick, Debtor)
Bankruptcy Case No. 91-00994-7, Adv. Case. No. A91-1137-7

United States Bankruptcy Court
W.D. Wisconsin, Eau Claire Division

November 13, 1991

James M. Isaacson, for the plaintiff.
Charles V. Feltes, for the defendant.

Thomas S. Utschig, United States Bankruptcy Judge.

MEMORANDUM OPINION, FINDINGS OF FACT, AND CONCLUSIONS OF LAW

This matter comes before the Court on a complaint and objection to discharge filed by Gary L. Stanton. Plaintiff Stanton seeks to recover a debt of $1,659.08 from the debtor for tools sold to him on credit. The plaintiff asserts that he has a valid purchase money security interest in the tools at issue. The debtor-defendant, Robert R. Reddick, counters that his debt to Stanton is dischargeable in bankruptcy and raises several arguments in support of this contention. The plaintiff is represented by James M. Isaacson, the defendant by Charles V. Feltes.

The parties have stipulated to the following facts:

1. That the plaintiff Gary L. Stanton resides at 314 Columbia Street, Mondovi, Wisconsin. That at all times relevant herein and presently, he is a dealer for "Snap-on Tools Corporation" and is engaged in the sale of tools.

2. That the defendant Robert R. Reddick resides at 723 East Thomas St., Osseo, Wisconsin 54758. That at all times relevant herein and presently, he is a mechanic by trade. That at all times relevant herein the defendant Reddick uses the tools and tool box involved in this action in his trade.

3. That plaintiff Stanton makes weekly rounds with an equipment truck selling and distributing mechanic tools.

4. That on October 25, 1990, plaintiff Stanton called on a garage in Osseo, Wisconsin, where defendant Reddick had recently become employed. On that first meeting defendant Reddick purchased $1,597.79 worth of tools from Stanton and gave plaintiff Stanton a signed agreement purporting to be a purchase money

security agreement. This agreement is part of the invoice dated October 25, 1990. That invoice also includes a carry-over balance of $140.00, representing the debtor's outstanding balance with another Snap-on dealer.

5. That plaintiff Stanton called on defendant Reddick again a week later on November 1, 1990, and defendant Reddick bought an additional $203.13 worth of new tools. That defendant Reddick did not sign the purchase money security agreement which was part of the invoice dated November 1, 1990.

6. That defendant Reddick subsequently changed jobs and became employed as a mechanic by Peterson Implement Company in Whitehall, Wisconsin. That Whitehall, Wisconsin, is in a different Snap-on sales district which is serviced by a Snap-on dealer by the name of Brian Herbison.

7. That thereafter Mr. Herbison sold additional tools to the defendant Reddick and acted as plaintiff Stanton's agent in the collection of the account due the plaintiff. That Mr. Herbison's ledger record regarding sales to and payment received from defendant Reddick has as its beginning balance the sum of $1,951.09 as of November 1, 1990. This amount is also the "Closing" balance on Mr. Reddick's account while it was being handled by the plaintiff Stanton.

8. That there were a total of seven Snap-on receipts prepared by Mr. Herbison which were given to defendant Reddick. These receipts reflect the plaintiff Stanton's carry-over balance on the Reddick account (i.e. $1,951.08) and subsequent sales to and payments made by defendant Reddick on his Snap-on account while it was being handled by Mr. Herbison.

9. That by virtue of plaintiff's dealership Agreement with Snap-on Tools Corporation, he is responsible for all sums sold by him to the defendant Reddick.

10. That the defendant Reddick filed a Chapter 7 bankruptcy petition on March 25, 1991. That in Schedule B-4 (Property Claimed Exempt) the defendant claimed the secured tools and tool box as exempt.

11. That the plaintiff Stanton never filed any Financing Statement in relation to the secured tools and tool box with the Office of the Register of Deeds, Secretary of State or otherwise. That at all times relevant herein, the tools and tool box subject to this action have been in the defendant's possession.

The debtor raises three arguments in support of his assertion that the debt to the plaintiff is dischargeable. First, the debtor argues that the plaintiff's lien in the tools and tool box is voidable. Reduced to its essentials, the debtor argues that, since the plaintiff's security interest is unperfected, the bankruptcy trustee has priority over this interest. The debtor bases this argument on 11 U.S.C. § 544, which gives the trustee lien creditor status in certain circumstances and powers of avoidance against inferior liens on the basis of that status. The debtor cites several cases for the proposition that the trustee, by virtue of his § 544 avoiding powers, takes priority over an unperfected security interest. See Andriacchi's, Inc. v. Pike (In re Pike), 62 B.R. 765 (W.D. Mich. 1986); Navarro v. Lucas (In re K & A Servicing, Inc.), 47 B.R. 807 (Bankr. N.D. Tex. 1985); McDonald v. Nat'l Bank of Stigler (In re Hill), 7 B.R. 433 (Bankr. W.D. Okla. 1980). The debtor then asserts that if the trustee can avoid a lien under § 544, then the debtor can do likewise pursuant to 11 U.S.C. § 522(c) in order to preserve an exemption. Thus, the argument concludes, the plaintiff's security interest is voidable.

The Court finds the debtor's assertions to be a misstatement of the law and

therefore without merit. Contrary to the debtor's assertion, 11 U.S.C. § 522(c) does not give the debtor the same avoiding powers that the trustee has under § 544. § 522(c) merely limits the property in which the debtor can successfully claim an exemption. The provisions which address the avoiding powers of the debtor in cases in which the trustee chooses not to assert his avoiding powers are § 522(g) and (h). Without citing those sections in their entirety, it is sufficient to note that they do not help the debtor's cause herein since § 522(g) specifically excludes property [here, the security interest] which the debtor voluntarily transferred. See 11 U.S.C. § 522(g)(1)(A) (West 1991). Since the debtor voluntarily granted the security interest to the plaintiff, those provisions do not help the debtor's cause here. These are the only provisions which empower a debtor to act in lieu of trustee action pursuant to § 544. The debtor's argument based on § 522(c) and § 544 is therefore without merit.

As his second argument, the debtor asserts that he can avoid the plaintiff's lien pursuant to 11 U.S.C. § 522(f). That provision provides:

> (f) Notwithstanding any waiver of exemptions, the debtor may avoid the fixing of a lien on an interest of the debtor in property to the extent that such lien impairs an exemption to which the debtor would have been entitled under subsection (b) of this section, if such lien is--
>
> (1) a judicial lien; or
>
> (2) a nonpossessory, nonpurchase-money security interest in any--
>
> (A) household furnishings, household goods, wearing apparel, appliances, books, animals, crops, musical instruments, or jewelry that are held primarily for the personal, family, or household use of the debtor or a dependent of the debtor;
>
> (B) implements, professional books, or tools, of the trade of the debtor or the trade of a dependent of the debtor; or
>
> (C) professionally prescribed health aids for the debtor or a dependent of the debtor.

11 U.S.C. § 522(f) (West 1991).

The key issue as to this argument is whether the plaintiff's interest is a purchase money security interest so as to be nonavoidable pursuant to § 522(f)(2). The sales documents submitted to the Court all contain language that the purchaser (of the tools) agrees that "[t]he Snap-on dealer . . . shall retain a Purchase Money Security Interest in the tools sold to me and listed above until I have made all the promised payments . . . ." This language is sufficient to establish a purchase money security interest on behalf of the plaintiff under Wisconsin law. See WIS. STAT. ANN. § 409.107(1) (West 1964).

The Court must next determine the value of the tools in which the plaintiff retained a purchase money security interest. By virtue of the sales invoice dated October 25, 1990, containing the language cited above and signed by the debtor, the plaintiff retained a security interest in $1,597.97 worth of tools. This was the value of the tools purchased on that date and listed on that invoice; the plaintiff did not retain a purchase money security interest in the prior balance of $140.00 carried over on that invoice. See Stipulation as to Facts, Exhibit A. The next invoice is dated November 1, 1990, and involved a purchase of $213.29 worth of tools. The debtor did not sign this invoice, however, and therefore the plaintiff did not retain a security interest in the

tools sold on that day. See Stipulation as to Facts, Exhibit B; WIS. STAT. ANN. § 409.203(1)(a) (West Supp. 1991). The sale made on November 1, 1990, was the last sale between the plaintiff and the debtor; several weeks later the debtor's account was transferred to a different Snap-on dealer --Brian Herbison. All subsequent purchases of the debtor were made from that dealer and the amounts of those purchases were added to the debtor's prior balance under a revolving account agreement. Since Snap-on dealer Stanton is the only plaintiff here, the Court need not concern itself with the subsequent purchases of the debtor from Snap-on dealer Brian Herbison.

The debtor did, however, make payments totalling $340.00 on his account. See Stipulation as to Facts, Exhibit C. Since the parties' security agreements do not specify how the payments are to be applied, the Court will apply the payments pursuant to Wisconsin's "first-in, first-out" payment provision. See WIS. STAT. ANN. § 422.418(3) (West 1988). Other courts have applied a "first-in, first-out" method of allocation of payments where the security agreement at issue contained no payment allocation clause. See, e.g., In re Gibson, 16 B.R. 257, 268-71 (Bankr. D. Kan. 1981). See generally White & Summers, Uniform Commercial Code, § 24-9 at 332-334 (3rd ed. 1988). The $340.00 in payments will therefore be applied first to the opening balance of $140.00 noted on the October 25, 1990, invoice. The remaining $200.00 will be applied to the $1,597.79 in tools purchased on that day. The Court holds that the plaintiff thus retained a security interest in $1,397.79 worth of tools.

The debtor contends, however, that the "Revolving Account Agreement" signed by him at each purchase from Snap-on dealer Herbison constituted a consolidation of several security agreements and thus operated to destroy the purchase-money nature of the plaintiff's interest. The debtor cites In re Luczak, No. MM7-81-01230 (Bankr. W.D. Wis. January 19, 1982) in support of this proposition. That court and numerous others have held that where security agreements are consolidated, effectively combining antecedent or after-acquired debt with new purchases under one contract, the purchase-money character of the security interest is destroyed. See, e.g., SouthTrust Bank v. Borg-Warner Acceptance Corp., 760 F.2d 1240 (11th Cir. 1985); Pristas v. Landaus of Plymouth, Inc., 742 F.2d 797 (3rd Cir. 1984). See generally Clark, The Law of Secured Transactions Under the Uniform Commercial Code para. 12.02 at 12-8 - 12-10 (2nd ed. 1988). The Court has examined numerous cases that have so held and finds the present case factually distinguishable from them. Those cases almost always involved security agreements containing after-acquired property clauses or cross-collateralization clauses; or they involved the consolidation of separate security agreements into a new one. Here, there is no cross-collateralization clause or after-acquired property clause whatsoever. There was also no consolidation of the individual security agreements. Each purchase involved a separate purchase money security interest only for those items bought at that particular purchase transaction. The only thing that was consolidated was the outstanding balance from the various purchases by the debtor from the Snap-on dealers. Thus there was no effort to have a particular item of collateral secure more than its purchase price. Other courts have reached the same result under similar facts. See, e.g., Breakiron v. Montgomery Ward (In re Breakiron), 32 B.R. 400 (Bankr. W.D. Pa. 1983). Accordingly, the Court holds that the plaintiff retained a purchase money security interest in $1,397.79 worth of tools purchased on October 25, 1990. The debtor, therefore, cannot avoid the plaintiff's lien to that extent pursuant to 11 U.S.C. § 522(f).

The debtor's third and final argument is that the plaintiff's claim is barred under Bankruptcy Rule 4003(b). The debtor contends that the plaintiff failed to object to his

list of claimed exemptions within 30 days of the first meeting of creditors and the plaintiff's claim is thus barred. Here too the debtor is in error. As a secured creditor, the plaintiff was not required to object to the debtor's claim of exemptions since the plaintiff holds a lien on the property at issue. § 522(c) provides that a debt secured by a lien that is not avoided pursuant to § 522(f) or (g) is not exempt from creditors' claims. See 11 U.S.C. § 522(c) (West 1991). The normal procedure in cases such as this one is for the debtor to make a motion to avoid the plaintiff's lien pursuant to § 522(f). The plaintiff would then object and the matter would be decided at a hearing on the § 522(f) motion. Merely because the plaintiff did not object to the debtor's claim of exemptions does not allow the debtor to exempt property on which a creditor holds a nonavoidable lien. See Robinson v. Olin Fed'l Credit Union, 48 B.R. 732, 738 (D. Conn. 1984); In re Staniforth, 116 B.R. 127, 130-31 (Bankr. W.D. Wis. 1990); In re Mitchell, 80 B.R. 372, 374-80 (Bankr. W.D. Tex. 1987). The debtor's timeliness argument is therefore without merit.

This matter is before the Court in a rather unorthodox posture -- namely that the creditor-plaintiff has objected to the discharge of the debtor-defendant's debt to it. As noted, the normal procedure would be for the debtor to make a § 522(f) lien-avoidance motion and for the creditor to object. Because of the basis upon which the plaintiff filed its complaint, the Court must deny its objection to discharge, since the debt at issue here will be discharged in the debtor's bankruptcy. The plaintiff's lien, however, will survive and pass through the bankruptcy as a nonavoidable purchase money security interest in the amount of $1,397.79.

Accordingly, the plaintiff's objection to discharge is denied but it retains a nonavoidable purchase money security interest in the subject property in the aforementioned amount.

This decision shall constitute findings of fact and conclusions of law pursuant to Bankruptcy Rule 7052 and Rule 52 of the Federal Rules of Civil Procedure.