

ORDERED.



Dated: September 14, 2010

Eileen W. Hollowell

EILEEN W. HOLLOWELL
U.S. Bankruptcy Judge

**UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF ARIZONA**

In re:)	
)	Chapter 7
GARY R. GREENE,)	
)	Case No. 4:09-bk-23879-EWH
Debtor.)	
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TRUDY A. NOWAK, Chapter 7)	
Trustee,)	Adv. No. 4:09-ap-01459-EWH
Plaintiff,)	
v.)	MEMORANDUM DECISION
LINDA JANE HERSHENSON,)	
)	
Defendant.)	
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I. INTRODUCTION

A car dealership failed to timely record a creditor's lien interest in a debtor's car after it volunteered to process the title application. After the debtor filed for bankruptcy, the Chapter 7 trustee sought to avoid the creditor's lien. For the reasons explained below, the creditor is entitled to damages against the car dealership in the event that the Chapter 7 trustee successfully avoids the lien.

1 **II. FACTS AND PROCEDURAL HISTORY**

2 On August 21, 2009, Gary Greene (the "Debtor") purchased a 2009 Honda Fit
3 (the "Honda") for \$17,595.00 from Chapman Imports of Tucson, LLC, which does
4 business as Chapman Honda (herein, simply "Chapman") by executing a written
5 purchase contract with Chapman. Because the Debtor was unable to obtain traditional
6 financing, Linda Hershenson ("Hershenson") agreed to finance part of the purchase
7 price. Hershenson wrote a \$15,319.02 check to Chapman, and the Debtor executed a
8 Title and Registration Application (the "Title Application"), listing Hershenson as the lien
9 (the "Lien") holder on the Honda. A Chapman employee offered, as a "courtesy," to
10 process the Title Application. Hershenson and the Debtor left the Title Application with
11 Chapman, the Debtor drove off the lot with the Honda, and the Debtor now has
12 possession of it.

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15 Chapman waited to forward the Title Application to a private vehicle title
16 processing agency, Donna's Title, until after Hershenson's check cleared. Donna's Title
17 did not submit the Title Application until September 23, 2009, thirty-three days after the
18 Debtor signed it.

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20 On September 24, 2010, one day after Donna's Title submitted the Title
21 Application, the Debtor filed a Chapter 7 petition. On November 4, 2009, the Chapter 7
22 trustee, Trudy Nowak (the "Trustee"), initiated an adversary proceeding against
23 Hershenson seeking to avoid the Lien. Hershenson initially answered the complaint pro
24 se, but then retained counsel and amended her answer on February 26, 2010. She
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1 denies that the Lien can be avoided, and that issue is still to be decided pending further
2 briefing from the parties.

3 On March 12, 2010, Hershenson filed a third-party complaint against Chapman,
4 seeking to recover damages if the Trustee avoids the lien. Chapman answered on
5 April 29, 2010. Hershenson moved for summary judgment against Chapman on
6 May 21, 2010 seeking a declaration that Chapman was liable in the event that the
7 Trustee avoids the Lien. Chapman responded to Hershenson's motion and filed a cross
8 motion for summary judgment on July 15, 2010. Hershenson opposed Chapman's
9 motion on July 9, 2010, and Chapman replied on July 23, 2010. Oral argument was
10 held on August 3, 2010. The matter is ready for decision.

14 **III. ISSUE**

15 Is Chapman liable for damages to Hershenson if the Lien is avoided by the
16 Trustee?
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18 **IV. JURISDICTION**

19 Jurisdiction over this dispute is proper under 28 U.S.C. § 157(b)(1). The parties
20 have consented to the court's jurisdiction pursuant to 28 U.S.C. § 157(c)(2).
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22 **V. DISCUSSION**

23 Summary judgment is appropriate when the record shows that there is no
24 genuine issue of material fact and that the moving party is entitled to judgment as a
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1 matter of law. Fed. R. Civ. P. 56(c); *Caneva v. Sun Communities Operating L.P. (In re*
2 *Caneva)*, 550 F.3d 755, 760-61 (9th Cir. 2008). Whether there is a genuine issue as to
3 a material fact depends on the substantive law at issue. *Id.*; WRIGHT & MILLER, FEDERAL
4 PRACTICE AND PROCEDURE: CIVIL 3d § 2725.

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6 Arizona law controls the issues raised by the parties. *See, e.g., Mandalay Resort*
7 *Group v. Miller (In re Miller)*, 292 B.R. 409, 413-14 (B.A.P. 9th Cir. 2003). Hershenson
8 advanced two legal theories: (1) that Chapman is liable for breach of an oral contract in
9 which it agreed to perfect her security interest and/or (2) that when Chapman
10 volunteered to record the Lien, it created a legal duty to do so timely. Because the court
11 finds that Hershenson is correct about Chapman's duty to timely process the Title
12 Application, it need not address her argument that she had an oral contract with
13 Chapman.
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15 A person may be liable for failing to perform an act with due care when he or she
16 voluntarily undertakes it. *Lloyd v. State Farm Mut. Auto.*, 860 P.2d 1300, 1303 (Ariz.
17 1992) *citing* RESTATEMENT (SECOND) OF TORTS § 323 (1965).

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19 One who undertakes, gratuitously or for consideration, to render services to
20 another which he should recognize as necessary for the protection of the
21 other's person or things, is subject to liability to the other for physical harm
22 resulting from his failure to exercise reasonable care to perform his
23 undertaking if (a) his failure to exercise such care increases the risk of such
24 harm, or (b) the harm is suffered because of the other's reliance upon the
25 undertaking.

26 RESTATEMENT (SECOND) OF TORTS § 323. Arizona expressly adopted § 323, *Thompson*
27 *v. Sun City Cmty. Hosp.*, 688 P.2d 605, 616 (Ariz. 1984), and § 323 "applies whether
28 the harm to the other or his things results from the defendant's negligent conduct in the

1 manner of his performance of the undertaking, or from his failure to exercise reasonable
2 care to complete it,” RESTATEMENT (SECOND) OF TORTS § 323 cmt. a. While § 323
3 refers to physical harm, Arizona courts interpret § 323 to reach economic harm as well.
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5 *Lloyd*, 860 P.2d at 1303 citing *McCutchen v. Hill*, 710 P.2d 1056, 1059 (Ariz. 1985).

6 The uncontested evidence demonstrates that Chapman volunteered to process
7 the Title Application, which included perfecting the Lien, when it was left with Chapman,
8 and a Chapman employee said he would process the Title Application as a courtesy.
9 Chapman failed to exercise reasonable care in perfecting the Lien under Arizona law.
10 See A.R.S. § 47-9317. An unperfected security interest is vulnerable to subordination
11 by any one of a debtor’s creditors who sue and obtain judgment, A.R.S. § 47-9317(A),
12 or the security interest might be avoidable altogether by a bona fide purchaser for value,
13 A.R.S. § 47-9317(B). Arizona courts require strict compliance with the vehicle lien
14 perfection requirements despite sometimes harsh results, *Noble v. Bonnett*, 577 P.2d
15 248, 250 (Ariz. 1978), therefore, a lien has to be recorded within thirty days to fully
16 protect a lien holder as of the date of purchase, A.R.S. § 28-2133(B) (constructive
17 notice date of creditor’s lien is the date of purchase if a title application is received and
18 filed within thirty days). In this case, the Lien was recorded thirty-three days after
19 purchase.
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22 Chapman argues Arizona’s statutes impose no duty upon it to timely record the
23 Lien, but it was the operation of the Restatement’s § 323 that imposed that duty when
24 Chapman volunteered to process the Title Application—not the statutes. RESTATEMENT
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1 (SECOND) OF TORTS § 323. For the foregoing reasons, Hershenson is entitled to
2 summary judgment.
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5 **VI. CONCLUSION**

6 The foregoing constitutes the court's findings of fact and conclusions of law
7 pursuant to FED. R. BANKR. P. 7052. Counsel is directed to upload an order declaring
8 Chapman liable for damages should the Trustee successfully avoid the Lien.

9 Dated and signed above.
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11 Notice to be sent through the
12 Bankruptcy Noticing Center "BNC"
13 to the following

14 Gary R. Greene
15 231 East Highcourte Lane
16 Tucson, AZ 85737

17 Trudy A. Nowak
18 PMB #418
19 480 E. Ray Rd., #23
20 Phoenix, AZ 85044-6417

21 Michael M. Neal
22 Michael M. Neal, P.C.
23 110 S. Church Ave., #4298
24 Tucson, AZ 85701

25 Steven M. Cox
26 Waterfall, Economidis, Caldwell, et al
27 Williams Center Eighth Floor
28 5201 E. Williams Cr.
Tucson, AZ 85711

1 Linda Jane Hershenson
2 P.O. Box 64101
3 Tucson, AZ 85728-4101

4 Richard Aaron Edens
5 Burch & Cracchiolo, PA
6 702 E. Osborn Rd., #200
7 Phoenix, AZ 85014

8 Dina L. Anderson
9 Guttilla Murphy Anderson
10 5415 East High Street, Suite 200
11 Phoenix, AZ 85054

12 Office of the U.S. Trustee
13 230 North First Ave., Suite 204
14 Phoenix, AZ 85003

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