NOT FOR PUBLICATION

UNITED STATES BANKRUPTCY APPELLATE PANEL

OF THE NINTH CIRCUIT

In re:	BAP Nos. AZ-07-1182-DNK
	AZ-07-1215-DNK
RICK BRITT,	(Consolidated)
Debtor.	Bk. No. 06-00123
BANK OF THE WEST,	Adv. No. 06-00029
Appellant,	
v.	**M E M O R A N D U M**[1]
BRADLEY CHEVROLET,	
Appellee.	

Argued and Submitted on October 25, 2007
at Phoenix, Arizona

Filed - November 8, 2007

Appeal from the United States Bankruptcy Court
for the District of Arizona

Honorable Randolph J. Haines, Bankruptcy Judge, Presiding

Before: DUNN, NEITER[2] and KLEIN Bankruptcy Judges.

[1] This disposition is not appropriate for publication. Although it may be cited for whatever persuasive value it may have (see Fed. R. App. P. 32.1), it has no precedential value. See 9th Cir. BAP Rule 8013-1.

[2] Hon. Richard M. Neiter, U.S. Bankruptcy Judge for the Central District of California, sitting by designation.

This appeal arises out of a third-party complaint filed by the appellant, Bank of the West ("Bank"), against the appellee, Bradley Chevrolet ("Dealer"), to recover damages sustained by the Bank from the avoidance of its security interest in a truck by the chapter 7 trustee.[3] The Bank's security interest was avoided as a preference because it was not perfected within 30 days after the debtor, Rick Britt ("Debtor"), received possession of the truck, and thereby fell outside the 30-day safe harbor afforded by § 547(c)(3).

The Bank moved for summary judgment. The Bank contended that it lost its lien because the Dealer did not perfect the lien timely pursuant to Arizona law, as required by certain contractual warranties. The bankruptcy court denied summary judgment to the Bank and granted summary judgment to the Dealer. The bankruptcy court also awarded the Dealer attorney's fees. The Bank appealed both of the bankruptcy court's rulings, which were consolidated in the appeal before us. We AFFIRM.

I. FACTS

The facts are undisputed. The Bank financed purchases of motor vehicles by customers of the Dealer, pursuant to a master installment sale contract agreement ("Master Agreement"). Specifically, under the Master Agreement, the Bank agreed to purchase some of the installment sale contracts generated by the

[3] Unless otherwise indicated, all chapter, section and rule references are to the Bankruptcy Code, 11 U.S.C. §§ 101-1532, and to the Federal Rules of Bankruptcy Procedure, Rules 1001-9036, as enacted and promulgated as of October 17, 2005, the effective date of most of the provisions of the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005, Pub. L. 109-8, 119 Stat. 23.

Dealer's sales of motor vehicles. The Master Agreement contained the following two express warranties:

> 7. Dealer's Specific Contract Warranties. Dealer warrants that, as of the sale of a contract to Bank:
>
> a. Dealer has caused title to the contract, free of any lien or encumbrance, and a sole perfected first lien security interest in the vehicle to be conveyed to Bank;
>
> . . .
>
> e. The buyer has and shall have no defense, offset or counterclaim as to the enforcement of the contract arising out of the conduct of Dealer (or out of previous events); . . . .

The Master Agreement specified under paragraph 19 that it constituted the entire agreement of the parties and that California law governed the agreement between the Bank and the Dealer. The Master Agreement further provided, under paragraph 16, that the prevailing party would be entitled to recover its attorney's fees and costs incurred in any legal proceeding to enforce the terms of the Master Agreement.

On February 24, 2006, the Dealer sold a truck to the Debtor. The Bank financed the purchase, and its security interest in the truck attached on the same day.

Under Arizona law, a security interest in a motor vehicle must be perfected by filing an application for title and registration with the Arizona Motor Vehicle Department ("MVD") and by listing the secured creditor's lien on the certificate of title. A.R.S. § 28-2132(B). Perfection of the security interest in the motor vehicle would date from either: (1) the date on which the security agreement was executed, provided that the MVD received and filed the title and registration application within

ten days of its execution; or (2) the date on which the MVD received and filed the title and registration application, as shown by the MVD's endorsement. A.R.S. § 28-2133(B).

Accordingly, the Dealer delivered a title and registration application to the MVD on March 15, 2006, and again on March 23, 2006. The MVD returned both applications as being defective. The Dealer delivered a title and registration application to the MVD for a third time on March 27, 2006. The MVD endorsed the application on March 28, 2006.

Approximately eighty-three days later, on June 19, 2006, the Debtor filed for bankruptcy relief under chapter 7.

Shortly thereafter, the trustee filed a complaint against the Bank to avoid its lien as a preferential transfer under § 547(b). The Bank filed an answer and a third-party complaint against the Dealer. In its third-party complaint, the Bank alleged that the Dealer breached the warranties in the Master Agreement by failing to timely perfect the Bank's lien pursuant to Arizona law and by allowing the trustee to obtain a defense to enforcement of the Bank's security interest. As a result of the Dealer's breach of warranties, the Bank claimed, the Bank's lien was subject to avoidance by the trustee.

Upon the trustee's motion and without opposition from the Bank, the bankruptcy court granted summary judgment in favor of the trustee.[4] The trustee subsequently sold the truck, free and clear of the Bank's lien, for $20,000.

[4] The Bank decided not to oppose the trustee's motion for summary judgment because it believed it had no statutory defense.

The Bank moved for summary judgment against the Dealer. In a published opinion, Bank of the West v. Bradley Chevrolet (In re Britt), 369 B.R. 526 (Bankr. D. Ariz. 2007), the bankruptcy court denied summary judgment to the Bank and granted summary judgment to the Dealer.[5]

The bankruptcy court determined that, contrary to the Bank's contention, the Dealer's late perfection of the lien did not breach the warranty under paragraph 7(a). Id. at 530. Limiting its review to the warranty's terms, the bankruptcy court found that nothing in paragraph 7(a) required timely perfection. Id. Rather, it merely required the Dealer to convey a sole perfected first lien security interest to the Bank, which the Dealer had done. Id. The bankruptcy court reasoned that the trustee's avoidance of the Bank's lien as a preferential transfer "did not in any way detract from its being a 'sole perfected first lien security interest.'" Id.

The bankruptcy court further determined that the Dealer did not breach the warranty under paragraph 7(e). Id. at 531. The bankruptcy court concluded that, under the express language of § 547(b), only a trustee may bring a preference action; it was not a defense that the debtor could assert. Id. at 530-31. Accordingly, based on these determinations, the bankruptcy court entered its order granting summary judgment to the Dealer ("Summary Judgment Order") on May 3, 2007.

In a separate order entered May 22, 2007, the bankruptcy court awarded the Dealer its attorney's fees ("Attorney's Fees

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[5] The Dealer did not file a cross-motion for summary judgment.

Order").[6] Although the bankruptcy court was reluctant to award the Dealer attorney's fees, as the Dealer's actions caused the Bank's loss, it concluded that it lacked discretion to refuse the Dealer attorney's fees under the terms of the Master Agreement.

The Bank timely appealed the Summary Judgment Order and the Attorney's Fees Order.

II. JURISDICTION

The Bank essentially asserts a state law contract claim against the Dealer. Thus, as a threshold matter, we must determine whether the bankruptcy court had jurisdiction to issue a final judgment and whether we, in turn, have jurisdiction to review the judgment on appeal. See Krasnoff v. Marshack (In re General Carriers Corp.), 258 B.R. 181, 188-89 (9th Cir. BAP 2001)("We examine sua sponte the bankruptcy court's jurisdiction, because a judgment entered without jurisdiction is void. When the bankruptcy court lacks jurisdiction, we have jurisdiction on appeal . . . for the purpose of correcting the error of the lower court in entertaining the suit.")(internal citations and quotations omitted).

The bankruptcy court has original but not exclusive jurisdiction over civil proceedings related to cases under the Bankruptcy Code. Id. at 189. "Related to" proceedings are those that do not "invoke a substantive right under the Bankruptcy Code and could exist outside of bankruptcy." Id. Claims "related to"

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[6] The Dealer requested an award of attorney's fees in its response to the Bank's summary judgment motion. The bankruptcy court did not address the issue of attorney's fees in its opinion, however.

the bankruptcy are noncore proceedings. Id.

Typically, in noncore proceedings, the bankruptcy court makes findings and recommendations to the district court, which has jurisdiction to enter the final order or judgment. 28 U.S.C. § 157(c)(1). State law contract claims asserted against a non-debtor are noncore matters. Taxel v. Elec. Sports Research (In re Cinematronics, Inc.), 916 F.2d 1444, 1450 (9th Cir. 1990)(citing Piombo Corp. v. Castlerock Properties (In re Castlerock Properties), 781 F.2d 159, 162 (9th Cir. 1986)). But see Conseco Fin. Servicing Corp. v. RV Traders (In re Lockridge), 303 B.R. 449, 456 (Bankr. D. Ariz. 2003)(a creditor's third-party complaint seeking indemnification on a state law theory is a core proceeding within the meaning of 28 U.S.C. § 157(b), as the creditor's claim had arisen from the trustee's lien avoidance action).

The bankruptcy court may hear and determine, and enter final orders and judgments, in noncore proceedings, however, if the parties consent to its jurisdiction. 28 U.S.C. § 157(c)(2). In such instances, the bankruptcy court's findings of fact are reviewed for clear error and its conclusions of law de novo. Daniels-Head & Assoc. v. William M. Mercer, Inc. (In re Daniels-Head & Assoc.), 819 F.2d 914, 918 (9th Cir. 1987).

Although the Bank's breach of contract claim is a noncore matter, both the Bank and the Dealer, as well as the bankruptcy court, assumed that the issue in dispute was a core matter within the bankruptcy court's jurisdiction. This is not fatal to the finality of the judgment.

The bankruptcy adversary proceeding rules require the parties to state their positions regarding core and noncore status and consent to have a bankruptcy judge hear and determine noncore matters. Fed. R. Bankr. P. 7008(a) & 7012(b). The requisite consent to have the bankruptcy court hear and determine the matter may be inferred from conduct and from the absence of objection. See Mann v. Alexander Dawson, Inc. (In re Mann), 907 F.2d 923, 926 (9th Cir. 1990); Daniels-Head, 819 F.2d at 919; Price v. Lehtinen (In re Lehtinen), 332 B.R. 404, 410-11 (9th Cir. BAP 2005). Such inferential consent based on conduct and lack of objection is present here. The Bank pled the matter as a core proceeding. In its answer to the Bank's third-party complaint, the Dealer admitted that it was a core proceeding over which the bankruptcy court had jurisdiction pursuant to §§ 1334(b) and 157(b). Further, neither the Bank nor the Dealer has objected to the bankruptcy court's jurisdiction.

Thus, the bankruptcy court had jurisdiction over this noncore proceeding pursuant to 28 U.S.C. §§ 1334 and 157(c)(2). And we, in turn, have jurisdiction pursuant to 28 U.S.C. § 158.

III. ISSUES

(1) Whether the bankruptcy court erred in denying summary judgment to the Bank by determining that the Dealer did not breach warranties under the Master Agreement.

(2) Whether the bankruptcy court erred in awarding the Dealer attorney's fees.

IV. STANDARDS OF REVIEW

We review a bankruptcy court's conclusions on questions of contract interpretation de novo unless extrinsic evidence was introduced on issues such as intent. Gerwer v. Salzman (In re Gerwer), 253 B.R. 66, 70 (9th Cir. BAP 2000). We also review summary judgment orders de novo. Tobin v. San Souci Ltd. P'ship (In re Tobin), 258 B.R. 199, 202 (9th Cir. BAP 2001). "'Summary judgment is appropriate when the contract terms are clear and unambiguous, even if the parties disagree as to their meaning.'" Kassbaum v. Steppenwolf Prods., Inc., 236 F.3d 487, 491 (9th Cir. 2000)(quoting United States v. King Features Entm't, Inc., 843 F.2d 394, 398 (9th Cir. 1988)).

We review a bankruptcy court's interpretation of state law de novo. State Bd. of Equalization v. Leal (In re Leal), 366 B.R. 77, 80 (9th Cir. BAP 2007). When interpreting state law, we follow the decisions of the highest state court. Security Pac. Nat'l Bank v. Kirkland (In re Kirkland), 915 F.2d 1236, 1238 (9th Cir. 1990). If the highest state court has not ruled on an issue, we predict the result it would reach based on state appellate court opinions, statutes, treatises and restatements. Id. at 1239. In the absence of "convincing evidence" that the highest state court would decide differently, we follow the decisions of the state's appellate courts. Id.

We will not disturb a bankruptcy court's grant of attorney's fees on appeal, unless the bankruptcy court abused its discretion or erroneously applied the law. Wechsler v. Macke Int'l Trade, Inc. (In re Macke Int'l Trade, Inc.), 370 B.R. 236, 245 (9th Cir. BAP 2007). In such instances, we review the bankruptcy court's

grant of attorney's fees for abuse of discretion. Id.

V. DISCUSSION

Although Arizona law provides for the perfection of a security interest in a motor vehicle to relate back to the date of execution if perfection occurs within ten days, the key statutory provision in this appeal is § 547(c)(3), which protects from avoidance as a preference a security interest that is perfected within 30 days after the debtor receives possession of the property. The avoidance as a preference of the Bank's security interest in the truck having been determined on summary judgment, the ultimate question here is whether the Dealer or the Bank bears the loss.

A. The Dealer Did Not Breach the Warranties in the Master Agreement

1. The warranty under paragraph 7(a) did not require the Dealer to provide the Bank with an unavoidable lien

The Bank attempts to expand the meaning of clear title and "a sole perfected first lien security interest" under paragraph 7(a) to include protection against lien avoidance. Interpreting these terms by their plain meaning, the bankruptcy court determined that the warranty did not require the Dealer to perfect the lien timely. The bankruptcy court did not cite to either California or Arizona contract law in support of its interpretation.

On appeal, the parties assume that Arizona contract law controls. Although the Master Agreement provides that California

law controls the agreement of the parties, neither the Bank nor the Dealer raised the choice of law provision as an issue in this appeal. Because the parties earlier agreed to be bound by California law, we interpret the warranties applying California contract law.[7]

Under California contract law, the court must interpret the contract to give effect to the parties' mutual intent at the time they made the contract. Cal. Civ. Code § 1636 (2007); TRB Investments, Inc. v. Fireman's Fund Ins. Co., 145 P.3d 472, 476-77 (Cal. 2006). The court must ascertain the parties' intent only from the written provisions of the contract, if possible. Cal. Civ. Code § 1639; TRB Investments, Inc., 145 P.3d at 477. The clear and explicit meaning of such provisions, interpreted in their ordinary and popular sense, in the absence of evidence to the contrary, controls the court's interpretation. Cal. Civ. Code §§ 1638, 1644; Cal. Code Civ. Proc. § 1861; AIU Ins. Co. v. Superior Court of Santa Clara County, 799 P.2d 1253, 1264 (Cal.

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[7] Unlike California contract law, Arizona contract law permits a court to look beyond the written provisions of the contract and to consider extrinsic evidence in interpreting contract language without first determining whether an ambiguity exists. Taylor v. State Farm Mut. Auto. Ins. Co., 854 P.2d 1134, 1139-41 (Ariz. 1993). Although the third-party complaint in this case involves parties and transactions with a nexus to Arizona, neither the Bank nor the Dealer submitted extrinsic evidence to the bankruptcy court to aid in its interpretation of the language of the Master Agreement. There is nothing in the record before us indicating that the parties offered, or that the bankruptcy court considered extrinsic evidence. We thus conclude, for purposes of this appeal, that California contract law and Arizona contract law are essentially fungible with respect to the issues before us.

1990)("[I]f the meaning a layperson would ascribe to the contract language is not ambiguous, we apply that meaning.").

A court may look to general dictionary definitions to aid its analysis of a term's meaning. Scott v. Cont'l Ins. Co., 51 Cal. Rptr. 2d 566, 569 (Cal. Ct. App. 1996)(noting that courts regularly use dictionaries to ascertain the ordinary meanings of words to interpret statutes and insurance policies)(citations omitted). The court must keep in mind, however, that "the language in the contract must be interpreted as a whole, and in the circumstances of the case, and cannot be found ambiguous in the abstract." TRB Investments, Inc., 145 P.3d at 477.

Limiting our review to the language of the Master Agreement, we note that none of its provisions suggest that the parties intended the phrases, "title, free and clear of any lien or encumbrance" and "sole perfected first lien security interest," to mean anything other than what they say.

In its conventional and ordinary sense, "title, free and clear of any lien or encumbrance" simply means clear title. Black's Law Dictionary 1522 (8th ed. 2004).[8] More specifically, clear title means that the goods are not subject to a valid security interest or a valid claim of title of a third person that would expose the buyer to a lawsuit to protect its title. See 1 White & Summers, Uniform Commercial Code § 9-16 at 684 (5th

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[8] Black's Law Dictionary qualifies as a general dictionary for purposes of contract interpretation. See Flintkote Co. v. Gen. Accident Assurance Co. of Canada, 410 F.Supp. 2d 875, 887-88 (N.D. Cal. 2006)(citing Cooper Cos. v. Transcon. Ins. Co., 37 Cal. Rptr. 2d 508, 513 (Cal. Ct. App. 1995), as an example where a court used Black's Law Dictionary to ascertain the ordinary meaning of "hereafter").

ed. 2002); 18 Williston on Contracts § 52:61 at 350 (4th ed. 2001). "Sole perfected first lien security interest" means, in its conventional and ordinary sense, that the creditor has the only secured interest in the collateral and that its interest in the collateral is senior to and valid as against other creditors. See Black's Law Dictionary 942, 1173, 1387; see also 4 White & Summers, Uniform Commercial Code §§ 30-2, 31-1 at 5, 96.

Interpreting these Master Agreement terms in the contract as a whole and in the circumstances of this case, these terms merely ensure that the Bank receives valid first priority security interests in the vehicles the Dealer sells in exchange for providing financing on the vehicles. There is nothing in the phrases, "title, free and clear of any lien or encumbrance" and "sole perfected first lien security interest," that requires the Dealer to protect the Bank from lien avoidance. Rather, the Dealer only warranted that the vehicle was not subject to any security interest but the Bank's, and that there were no other valid claims of title in a third person to the truck. As the bankruptcy court pointed out, before the Debtor filed for bankruptcy, this was true – the Bank's lien was the only valid lien against the truck.

Further, nothing in the warranty requires the Dealer to perfect the lien timely. Again, there is nothing in the phrase, "perfected first lien," that requires the Dealer to perfect the lien within a particular time frame. In its ordinary and conventional sense, it only required the Dealer to take the proper steps to perfect. In this case, the Dealer needed only to follow the procedures set out under Arizona law to ensure that

the Bank's lien was senior to and valid against other creditors' liens. In its third attempt, the Dealer got it right.

As the bankruptcy court pointed out, none of the procedures outlined in A.R.S. § 28-2133(B), as written, require that perfection be completed within a certain time frame in order to be valid as against third parties. Put another way, in Arizona, the perfection of a lien in a vehicle does not depend on time.

The Dealer followed the procedures for perfection by delivering a title and registration application to the MVD and by listing the Bank's lien on the certificate of title. Perfection of the lien dated from the time on which the MVD received and filed the application, as shown by its endorsement – here, on March 28, 2006, thirty-two days after the Bank's lien in the vehicle attached. See 11 U.S.C. § 547(e)(2)(B). Unfortunately for the Bank, the trustee managed to avoid the lien because the Dealer perfected it within the preference period under the Bankruptcy Code. As the bankruptcy court implied, if the Bank wanted a lien unavoidable by the trustee as a preference, it should have included a deadline for perfection in the warranty. See Britt, 369 B.R. at 530. Notably, the Master Agreement was a form contract, which the Bank had prepared.

The Bank claims that, through no fault of its own, it has had to suffer loss resulting from the Dealer's negligence in perfecting the lien. Thus, the Bank argues, the bankruptcy court should have applied equity when interpreting the warranty's terms.

"Courts do not interpret contracts or other legal documents in order to achieve a particular result, equitable or not."

Flintkote, 410 F.Supp.2d at 891. Courts are not called upon to improve agreements between parties that they themselves have been satisfied to enter into, or to rewrite contracts because they may operate harshly or inequitably. Addiego v. Hill, 48 Cal. Rptr. 240, 243 (Cal. Ct. App. 1965). The court's job simply is to interpret the contract in such a way as to give effect to the parties' intent. Thus, the bankruptcy court was not required to consider equitable principles in interpreting the Master Agreement. The bankruptcy court only needed to interpret the terms of the contract to give effect to the intent of the Bank and the Dealer at the time they entered the Master Agreement.

2. The warranty under paragraph 7(e) does not apply to a preference action asserted by the trustee

The Bank argues that the Dealer breached paragraph 7(e) by untimely perfecting the Bank's lien, which enabled the trustee to assert a preference action and avoid the lien.

Within the context of a chapter 7 case, only a trustee may bring an action to avoid a preferential transfer under § 547(b).[9] See 5 Collier on Bankruptcy ¶ 547.11[1] (Alan N. Resnick & Henry J. Sommer eds., 15th ed. 2007)("Under its literal terms, Code section 547 vests the authority to pursue the avoidance of preferential transfers in 'the trustee.'"); cf. Houston v. Eiler

[9] The trustee can assign or transfer the power to bring and prosecute preference actions to third-parties. Duckor Spradling & Metzger v. Baum Trust (In re P.R.T.C., Inc.), 177 F.3d 774 (9th Cir. 1999); see also Simantob v. Claims Prosecutor, LLC (In re Lahijani), 325 B.R. 282 (9th Cir. BAP 2005). No such assignment was made to the Debtor in this case.

(In re Cohen), 305 B.R. 886 (9th Cir. BAP 2004)(determining that a chapter 13 debtor may exercise the trustee's strong-arm powers under § 544). Because the debtor does not act as the representative of the chapter 7 bankruptcy estate, he or she lacks standing to pursue the avoidance of a preferential transfer. 5 Collier on Bankruptcy ¶ 547.11[2][a].

As the bankruptcy court pointed out, a lien avoidance action is not a defense, offset or counterclaim that the Debtor could assert. Thus, the bankruptcy court did not err in determining that the Dealer did not breach its warranty.

B. The Dealer Is Entitled to Attorney's Fees

Almost as an afterthought, in the conclusion of its opening brief, the Bank requests that we reverse the Attorney's Fees Order. The Bank proffers no argument in support of reversal.

As discussed in Travelers Casualty & Surety Co. of Am. v. Pacific Gas & Electric, 127 S.Ct. 1199, 1203-04 (2007), the prevailing litigant may collect attorney's fees pursuant to a contract provision, enforceable under substantive nonbankruptcy law. In California, absent a statute to the contrary, a prevailing party is entitled as a matter of right to recover costs in any action or proceeding. Santisas v. Goodin, 951 P.2d 399, 403 (Cal. 1998)(quoting Cal. Code Civ. Proc. § 1032). Attorney's fees are allowable as costs, but only if they are authorized by contract or law. Id. at 404 (citing Cal. Code Civ. Proc. 1033.5(a)(10)(A)). In any action on a contract, the prevailing party is entitled to reasonable attorney's fees and costs where the contract explicitly provides that one of the

parties shall be awarded fees and costs incurred to enforce the provisions of the contract. Reynolds Metals Co. v. Alperson, 599 P.2d 83, 85 (Cal. 1979)(citing Cal. Code Civ. Proc. § 1717(a)).

Here, the Master Agreement expressly provides that, in an action to enforce its terms, the prevailing party shall have the right to recover its attorney's fees and costs. As the prevailing party in the third-party complaint, the Dealer had a contractual right to recover its attorney's fees and costs. The Bank did not contest the reasonableness of the fees and costs requested by the Dealer and awarded by the bankruptcy court. In these circumstances, the bankruptcy court did not err in awarding attorney's fees and costs to the Dealer pursuant to paragraph 19 of the Master Agreement.

VI. CONCLUSION

The bankruptcy court did not err in granting summary judgment in favor of the Dealer. The language in the warranty provisions is clear and unambiguous, despite the Bank's contentions to the contrary. The bankruptcy court properly determined on summary judgment that the Dealer did not breach its warranties by taking late steps to perfect the Bank's lien. Further, the bankruptcy court did not err in awarding attorney's fees and costs to the Dealer as the Master Agreement expressly provided for such fees and costs, particularly where the Bank did not contest the reasonableness of the attorney's fees and costs requested by the Dealer. We AFFIRM.