

1 UNITED STATE BANKRUPTCY COURT
2 DISTRICT OF ARIZONA

3 In re:) Chapter 7 Case
4 Mark Eugene Lloyd and)
Nancy Louis Lloyd,) Case No. 2:13-bk-21588-DPC
5 Debtors.)
6)
7)
8 Lawrence J. Warfield, Chapter 7 Trustee,) Adversary Proceeding
Plaintiff,) No. 2:14-ap-00173-DPC
9 v.)
10 Santander Consumer USA, Inc.,) **MEMORANDUM AND ORDER**
11 Defendant.) **ON MOTION TO DISMISS**
12) **COMPLAINT**¹
) (Not for Publication- Electronic
) Docketing ONLY)

13 **I. INTRODUCTION**

14 The duly-appointed trustee in the above-captioned Chapter 7 case, Lawrence J.
15 Warfield ("Plaintiff"), commenced this proceeding pursuant to 11 U.S.C. § 544(a)² to
16 avoid any lien rights held by Santander Consumer USA, Inc. ("Defendant") in the
17 Debtors' 2011 Subaru motor vehicle ("Vehicle"). Before the Court is Defendant's Motion
18 to Dismiss Complaint ("Motion") pursuant to Fed. R. Civ. P. 12(b)(6), as made applicable
19 to this proceeding by Fed. R. Bankr. P. 7012. Plaintiff filed a Response to the Motion
20 ("Response"), Defendant filed a Reply to the Response ("Reply"), and the Court heard
21 arguments of the parties, through their counsel, on May 8, 2014.

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24 ¹ This decision sets forth the Court's findings of fact and conclusions of law pursuant to Fed.R.Bankr.P.
25 7052. The issues addressed herein constitute a core proceeding over which this Court has jurisdiction.
26 28 U.S.C. §§ 1334(b) and 157(b).

² Unless otherwise indicated, all statutory citations are to Title 11, United States Code ("Bankruptcy Code").

1 **II. BACKGROUND**

2 The relevant facts are not in dispute. The Debtors purchased and received
3 delivery of the Vehicle on December 14, 2013. Defendant financed the purchase in the
4 amount of \$20,495. The Debtors also executed a Title and Registration Application
5 ("Application") on December 14, 2013, listing Defendant as lienholder.³ The Debtors'
6 chapter 7 case was commenced by the filing of a voluntary petition on December 18,
7 2013 ("Petition Date"). As of the Petition Date, Defendant had not completed the
8 requisite steps to perfect its lien on the Vehicle, but purported to do so by filing the
9 Application with Title America, an authorized third party of the Arizona Department of
10 Transportation Motor Vehicle Division ("MVD"), on January 13, 2014, the 30th day
11 after the Debtors took delivery of the Vehicle and executed the Application.⁴

12 The essence of the Complaint is that,

13 (1) Defendant's postpetition perfection actions (the filing of the Application) violated
14 the automatic stay under § 362(a) and are void for that reason, leaving Defendant
15 with an unperfected lien as of the Petition Date;

16 (2) the exception to the automatic stay under § 362(b)(3) does not apply because
17 under § 546(b)(1) and A.R.S. § 47-9317(E), Defendant failed to perfect its
18 security interest within 20 days after the Debtors received delivery of the Vehicle
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20 ³ The Application is attached to the Complaint as Exhibit 1. The Court notes that the parties do not
21 address the date of execution of the Application, but based on the language of A.R.S. § 28-2133(B), set
22 out below, the Court considers the date of execution to be a necessary element of Defendant's case. The
23 Debtors' signatures themselves are undated, but the Application appears to have been prepared on
24 December 14, 2013. Plaintiff has referred to December 14, 2013 as being the operative date for
25 determining when the clock started ticking on the steps Defendant was required to take in order to
26 perfect its lien. *See also* Complaint, dkt. no. 1, para. 8. For these reasons, and in the absence of any
dispute being raised, the Court finds that December 14, 2013 is the date of execution of the Application.

⁴ The January 13, 2014 date appears in Title America's receipt stamp. The Application also bears an
anonymous stamp indicating that it was "RECEIVED JAN 09 2014." The parties have not addressed this
date, but given the time periods involved in this case, the 4-day difference between January 9 and
January 13 is irrelevant.

1 and, therefore, Defendant's effective date of perfection did not relate back to
2 December 14, 2013; and

3 (3) Plaintiff's rights and powers under § 544(a) entitle Plaintiff to avoid what was, on
4 the Petition Date, an unperfected lien held by Defendant.

5 **III. ANALYSIS**

6 When considering whether to grant a motion to dismiss, the Court should assume
7 all material facts pleaded are true and interpret them in the most favorable light to the
8 nonmoving party. *In re Warfel*, 268 B.R. 205, 209 (9th Cir. BAP 2001). However, the
9 Court does not need to assume the truth of conclusory allegations. *Bell Atlantic*
10 *Corporation et al. v. William Twombly et al.*, 550 U.S. 544, 556, 127 S.Ct. 1955, 1966
11 (2007). To survive a motion to dismiss under Rule 12(b)(6), the plaintiff must provide
12 enough factual matter so that the claim is "plausible on its face." *Id.*, 550 U.S. at 570,
13 127 S.Ct. at 1974.

14 **A. Issues Presented**

15 The narrow issue raised by the Motion and Plaintiff's Response is whether the law
16 governing the effective date of perfection of a lien on a motor vehicle is A.R.S. § 47-
17 9317⁵ or A.R.S. § 28-2133.⁶

18 **B. The Statutes**

19 **1. Bankruptcy Statutes.**

20 The Court's analysis begins with an examination of the relevant statutes. Plaintiff
21 cites § 544(a) of the Bankruptcy Code for his avoidance power, a section that confers
22 upon a bankruptcy trustee the rights and powers of a hypothetical judicial lien creditor
23 (§ 544(a)(1)) and a hypothetical judgment creditor (§ 544(a)(2)) as of the Petition Date.

24 _____
25 ⁵ Found in A.R.S. under Title 47, "Uniform Commercial Code;" Chapter 9, "Secured Transactions;"
Article 3, "Perfection and Priority."

26 ⁶ Found in A.R.S. under Title 28, "Transportation;" Chapter 7, "Certificate of Title and Registration;"
Article 4 "Vehicle Liens and Encumbrances."

1 Both parties acknowledge that Plaintiff's rights and powers under § 544(a), as well as the
2 enforceability of the automatic stay against Defendant,⁷ are subject to § 546(b)(1), which
3 provides that,

4 The rights and powers of a trustee under sections 544, 545, and 549 of this
5 title are subject to any generally applicable law that--

6 (A) permits perfection of an interest in property to be effective
7 against an entity that acquires rights in such property before the date
8 of perfection; or

9 (B) provides for the maintenance or continuation of perfection of an
10 interest in property to be effective against an entity that acquires
11 rights in such property before the date on which action is taken to
12 effect such maintenance or continuation.

13 2. The Uniform Commercial Code Statute.

14 Plaintiff asserts that the "generally applicable law" referenced in § 546(b)(1) is
15 A.R.S. § 47-9317, which provides in pertinent part that,

16 A. A security interest or agricultural lien is subordinate to the rights of:

17 1. A person entitled to priority under § 47-9322; and

18 2. Except as otherwise provided in subsection E of this section, a person
19 that becomes a lien creditor before the earlier of the time:

20 (a) The security interest or agricultural lien is perfected if a person files a
21 financing statement with respect to a purchase money security interest;
22 or

23 (b) One of the conditions specified in § 47-9203, subsection B, paragraph
24 3 is met and a financing statement covering the collateral is filed.

25 ...

26 E. Except as otherwise provided in §§ 47-9320 and 47-9321, *if a person
files a financing statement with respect to a purchase money security
interest before or within twenty days after the debtor receives delivery
of the collateral, the security interest takes priority over the rights of a
buyer, lessee or lien creditors that arise between the time the security
interest attaches and the time of filing.*

⁷ The filing of a petition does not operate as a stay under § 362(a) of any act to perfect, or to maintain or
continue the perfection of, an interest in property to the extent that the trustee's rights and powers are
subject to such perfection under § 546(b). *See* § 362(b)(3).

1 (Emphasis added.) If the foregoing statute governs the effective date of Defendant's lien
2 perfection and Defendant's delivery of the Application to Title America on January 13,
3 2014 is the equivalent of filing a financing statement, (1) Defendant's perfection did not
4 occur within 20 days after the Debtors received the Vehicle; (2) the effective date of
5 Defendant's perfection was the date that the Application was filed, January 13, 2014; (3)
6 Defendant's act to perfect its lien on January 13, 2014 was not excepted from the
7 operation of the automatic stay, and, therefore, is void; and (4) Defendant's unperfected
8 security interest is trumped by Plaintiff's hypothetical lien creditor rights which arose on
9 the Petition Date.

10 3. Central Filing Statute.

11 Defendant asserts that the "generally applicable law" referenced in § 546(b)(1) is
12 A.R.S. § 28-2133, which provides in pertinent part that,

13 B. The filing and issuance of a new certificate of title as provided in this
14 article is constructive notice to creditors of the owner or to subsequent
15 purchasers of all liens and encumbrances against the vehicle described in
16 the certificate of title, except those that are authorized by law and that are
17 dependent on possession. *If the documents referred to in this article [a*
18 *signed application for title or application for registration (see A.R.S. § 28-*
19 *2132)] are delivered to a registering office or an authorized third party*
20 *provider of the department within thirty days after the date of their*
21 *execution, the constructive notice dates from the time of execution.*
22 *Otherwise, the notice dates from the time of receipt and filing of the*
23 *documents by the department as shown by its endorsement. For the*
24 *purposes of this subsection, the time stamp on the documents that is*
25 *administered by the registering officer or authorized third party provider of*
26 *the department electronically or otherwise is conclusive as to the time and*
date of delivery of the documents.

23 C. *The method provided in subsection B of this section for giving*
24 *constructive notice of a lien or encumbrance on a vehicle required to be*
25 *titled and registered under § 28-2153 or a mobile home required to be*
26 *titled under § 28-2063 is exclusive, except for liens dependent on*
possession. A lien, encumbrance or title retention instrument or document
that evidences any of them and that is filed as provided by this article is

1 *exempt from the provisions of law that otherwise require or relate to the*
2 *recording or filing of instruments creating or evidencing title retention or*
3 *other liens or encumbrances on vehicles of a type subject to registration*
4 *under this chapter.*

4 (Emphases added.)⁸ If this statute governs the effective date of Defendant's lien
5 perfection, (1) Defendant perfected its lien exactly 30 days after Debtors' execution of
6 the Application; (2) the effective date of perfection relates back to December 14, 2013;
7 (3) Defendant's postpetition acts to perfect the lien were excepted from the stay under
8 §§ 362(b)(3) and 546(b)(1); and (4) Defendant's perfected lien has priority over
9 Plaintiff's § 544 rights and powers under A.R.S. § 47-9322(A)(1), governing priorities
10 among conflicting security interests in the same collateral.

11 **C. Defendant's Position**

12 As authority for its position, Defendant cites A.R.S. § 47-9303(C), which
13 provides that,

14 The local law of the jurisdiction under whose certificate of title the
15 goods are covered governs perfection, the effect of perfection or
16 nonperfection and the priority of a security interest in goods covered by a
17 certificate of title from the time the goods become covered by the
18 certificate of title until the goods cease to be covered by the certificate of
19 title.

18 Defendant also cites A.R.S. § 47-9311(A)(2), which provides that,

19 Except as otherwise provided in subsection D of this section, the
20 filing of a financing statement is not necessary or effective to perfect a
21 security interest in property subject to: . . . A statute of this state that
22 provides for central filing of or that requires indication on a certificate of
23 title of a security interest in the property, including title 28, chapter 7,
24 article 4, and that requires indication of the security interest on a certificate
25 of title for a vehicle required to be titled and registered under § 28-2153
26 . . .

25 ⁸ Subsection C, quoted above, is not raised by the parties, but is included nevertheless as it defines the
26 scope and effect of subsection B.

1 Defendant cites Judge Case’s decision in *In re Moore*, 2006 WL 3064781 (Bankr.
2 D. Ariz. 2006) as further support. *Moore* involved a motor vehicle lien avoidance action
3 virtually identical to that before the Court, but *Moore* appears to have been argued
4 differently. Judge Case analyzed the *Moore* defendant’s actions under A.R.S. § 28-
5 2133, but Judge Case’s finding on that view falls short of a legal conclusion that A.R.S.
6 § 28-2133 is the applicable statute for determining the effective date of perfection. As
7 Judge Case stated: “The perfection does not fit within the safe harbor of Section 546(b)
8 if the applicable law is A.R.S. section 28-2133(B), as it provides only a ten day relation
9 back period and here twenty-nine days passed.” *Moore*, 2006 WL 3064781 at *1
10 (emphasis added).⁹ The emphasized language “*if*” makes Judge Case’s reference to
11 A.R.S. § 28-2133 conditional as far as that statute being considered the statute for
12 determining the effective date of perfection. The decision does not mention A.R.S. § 47-
13 9317. Rather, Judge Case proceeds to consider the *Moore* defendant’s position under (a)
14 § 547(c)(3)(B) and (b) §§ 362(b)(3) and 547(e)(2)(A), both of which schemes provide
15 for 30-day relation back periods under certain circumstances. However, those theories
16 are not raised by the parties in the case at bar.¹⁰

17 Defendant also cites *In re Anderson*, 2007 WL 1839699 (D. Ariz. 2007), which
18 affirmed the bankruptcy court’s decision permitting the trustee to avoid the appellant’s
19 motor vehicle lien under 11 U.S.C. § 544. In *Anderson*, the District Court clearly
20 considered A.R.S. § 28-2133(B) to be the “generally applicable law” for determining the
21 date of perfection, citing cases decided by the Arizona Supreme Court expressly finding
22 that A.R.S. § 28-325, the predecessor to A.R.S. § 28-2133, is the ‘central filing statute’

23 _____
24 ⁹ At the time of *Moore*, A.R.S. § 28-2133 provided for relation back only if the application was filed
within 10 days after its execution.

25 ¹⁰ Nevertheless, those theories would appear to be unavailing to Defendant: as Judge Case found in
26 *Moore*, § 547(c)(3)(B) only applies in preference actions (*see* preamble to § 547(c)), and prevailing case
law holds that § 547(e)(2)(A) does not constitute “generally applicable law” within the meaning of
§ 546(b).

1 prevailing over the provisions for security interests that arise under the Uniform
2 Commercial Code. See *First Nat'l Bank of Arizona v. Carbajal*, 132 Ariz. 263, 645 P.2d
3 778, 780 (Ariz. 1982) (“For a party seeking to perfect a security interest in a motor
4 vehicle, these provisions [A.R.S. §§ 28-325(B) through (F)] are mandatory”).
5 *Carbajal* is still good law. *Anderson* also follows Judge Haines’ decision in *In re*
6 *North*, 310 B.R. 152 (Bankr. D. Ariz. 2004). *North* did not involve a dispute over which
7 Arizona statute governs perfection of liens on motor vehicles, but it did involve a
8 determination of whether and when the bank in that case had perfected its lien. Judge
9 Haines made that determination by examining the actions that the bank took to perfect
10 its lien according to A.R.S. § 28-2133. *North*, 310 B.R. at 159-60.

11 **D. Plaintiff’s Position**

12 Plaintiff cites *In re Lockridge*, 303 B.R. 449, 457 (Bankr. D. Ariz. 2003) as
13 authority for his position that A.R.S. § 47-8317(E) is the applicable statute for
14 determining the effective date of perfection of a motor vehicle lien. In *Lockridge*, Judge
15 Haines determined whether an automotive dealership or a finance company should bear
16 the loss where a vehicle lien was not timely perfected. There, the dealership warranted
17 that, upon the finance company's purchase of the motor vehicle loan originated by the
18 dealership, the finance company would have a perfected first priority lien on the subject
19 vehicle. However, a chapter 7 bankruptcy trustee subsequently avoided the lien because
20 the effective date of perfection of the lien did not relate back to a prepetition date before
21 the trustee’s 11 U.S.C. § 544 rights and powers came into existence. Contrary to
22 Plaintiff’s assertion, however, Judge Haines determined the effective date of perfection
23 under A.R.S. § 28-2133, and found that the dealership had failed to “get the lien
24 reflected on Lockridge’s certificate until August 19, 2002, some 25 days after Lockridge

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1 purchased and took possession of the trailer." *See Lockridge*, 303 B.R. at 452.¹¹ The
2 dealership's failure to file the application with MVD within the relation back period was
3 fatal to the dealership's lien rights vis-à-vis the trustee, whose § 544 rights and powers
4 came into existence on August 12, 2002. *Id.* Judge Haines' reference to A.R.S. § 47-
5 9317(E) was solely in the context of determining the priority of the trustee's lien
6 creditor rights and the dealership's rights assuming that the dealership's lien perfection
7 was effective as of the date the application was filed (i.e., without relation back). *Id.* at
8 457. The Court does not need to reach that issue in the case at bar.

9 Plaintiff also cites *In re Britt*, 369 B.R. 526 (Bankr. D. Ariz. 2007), as authority
10 for his position that A.R.S. § 47-9317(E) is the applicable statute for determining the
11 effective date of perfection of a motor vehicle lien. *Britt* involved the same issue
12 presented in *Lockridge*, but in *Britt* the lien was avoided under § 547. The lien was
13 validly perfected prepetition, but it was done so within the 90-day preference period.
14 Plaintiff misreads Judge Haines' decision. In *Britt*, Judge Haines determined the
15 effective date of the dealership's lien perfection under A.R.S. § 28-2133(B). *Britt*, 369
16 B.R. at 529-30 (n. 8). In paragraph 4 of his Response to the Motion, Plaintiff asserts that
17 Judge Haines "held that the applicable relate-back time period was 20-days pursuant to
18 Ariz. Rev. Stat. § 47-9317(E) adopting UCC § 9-317." However, that holding is
19 nowhere to be found in the *Britt* decision. Further, the (unpublished) 9th Circuit B.A.P.
20 decision affirming Judge Haines' decision in *Britt* states,

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

¹¹ At the time of *Lockridge*, the relation back period under A.R.S. § 28-2133 was 10 days after execution of the title and registration application.

1 filed the title and registration application within ten days of its execution;
2 or (2) the date on which the MVD received and filed the title and
3 registration application, as shown by the MVD's endorsement. A.R.S.
4 § 28-2133(B).

5 *In re Britt*, 2007 WL 4867921 (9th Cir. BAP 2007).¹² Clearly, the BAP considers
6 A.R.S. § 28-2133 as the law governing perfection of motor vehicle liens and establishing
7 the appropriate relation back period.

8 Plaintiff argues in paragraph 4 of his Response that, "Ariz. Rev. Stat § 28-
9 2133(B) is not a relate-back statute, but rather is a statute that is instructive to the
10 Arizona Motor Vehicle Division as to what date to ascribe to the lien date on the title."
11 That argument ignores A.R.S. § 28-2133(C), quoted above, which makes clear in no
12 uncertain terms that the scope and effect of the statute is much broader than what
13 Plaintiff suggests. Moreover, the Court notes A.R.S. § 28-2135, entitled "Perfection of
14 Security Interest in Inventory and Mobile Homes," which provides in pertinent part that,

15 Notwithstanding any other provision in this article:

16 1. A security interest in inventory, as defined in § 47-9102,
17 consisting in whole or in part of vehicles required to be titled and
18 registered under § 28-2153 or of mobile homes shall be perfected in
19 accordance with the filing provisions of title 47, chapter 9, article 5 to the
20 extent that those provisions are applicable by virtue of title 47, chapter 9,
21 article 3.

22 The Legislature's reference in that context to title 47, chapter 9, article 3 – the source of
23 Plaintiff's position that A.R.S. § 47-9317 represents the "generally applicable law" that
24 the Court must apply – evidences that the Legislature knew how to distinguish between
25 different perfection procedures when it intended to. However, no such distinction
26 appears in A.R.S. § 28-2133.

¹² At the time *Britt* was decided, A.R.S. § 28-2133 provided for relation back only if the application was filed within 10 days after its execution.

1 Finally, the Court notes the 9th Circuit BAP's (unpublished) decision in *In re GTI*
2 *Capital Holdings, L.L.C.*, 2006 WL 6810997 (9th Cir. BAP 2006), a case involving what
3 the Panel described as "a creditor who ran afoul of the bankruptcy 'strong arm' powers
4 with respect to the status of its security interest." *Id.* at *1. While this case involved
5 several issues not at play here, the Panel had to review the lower court's conclusion that
6 the defendant lacked the requisite perfected lien on the subject motor vehicles, and in
7 affirming that conclusion (and the bankruptcy court's judgment in total), the Panel
8 stated,

9 Though Article 9 of the Arizona Uniform Commercial Code
10 generally governs the perfection of security interests in personal property,
11 the UCC filing provisions do not apply to the perfection of a security
12 interest subject to a certificate of title statute. A.R.S. § 47-9311B; *see*
13 *Noble v. Bonnett*, 577 P.2d 248, 250 (Ariz.1978) (en banc) ("We feel
14 constrained by the mandatory language of the statute to give a strict
15 interpretation."). The Arizona titled vehicle statutes are set forth in A.R.S.
16 §§ 28-2131 – 28-2136 ("Titled Vehicle Statutes").

17 Based on the Panel's holdings in *Britt* and *GTI Capital Holdings*, as well as the
18 statutes themselves, this Court finds that A.R.S. §§ 28-2131 through 28-2136 represent
19 the "generally applicable law" to which the Court must look to determine the effective
20 date of Defendant's lien perfection.

21 **IV. CONCLUSION**

22 Having established that A.R.S. § 28-2133 is the appropriate statute for
23 determining the effective date of Defendant's lien perfection, and it being undisputed
24 that Defendant filed its Application with the MVD-authorized third party within 30 days
25 after its execution, the Court finds that Defendant's date of perfection relates back to
26 December 14, 2013. Therefore, Plaintiff's rights and powers under 11 U.S.C. § 544(a),
which arose on the Petition Date of December 18, 2013, are inferior to Defendant's lien
rights. *See* § 546(b) and A.R.S. § 47-9322(A)(1). Defendant's Motion is granted and

1 Plaintiff's Complaint is dismissed.¹³

2 **So ordered.**

3 **Dated: June 2, 2014.**



4 DANIEL P. COLLINS
5 CHIEF UNITED STATES BANKRUPTCY JUDGE
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10 COPY of the foregoing mailed by
11 the BNC and/or sent by auto-generated
12 mail to interested parties.
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24 ¹³ In his Response to the Motion, Plaintiff prays for denial of the Motion or, in the alternative, leave to
25 amend the Complaint to account for any deficiencies. Based on the undisputed facts presented by the
26 parties and the Court's conclusions based on those facts, the Court finds that there are no amendments to
the Complaint which could change the outcome of this proceeding. Plaintiff's alternative prayer is
likewise dismissed.