Dated: February 08, 2006
The following is ORDERED:

Jennie D. Latta
UNITED STATES BANKRUPTCY JUDGE

UNITED STATES BANKRUPTCY COURT
WESTERN DISTRICT OF TENNESSEE
WESTERN DIVISION

In re

JEFFERY W. DENNISON
and AMI C. DENNISON,
Debtors.

Case No. 04-34765-L
Chapter 7

Bettye S. Bedwell, Trustee,
Plaintiff,

v.

Adv. Proc. No. 05-00139

Capital One Auto Finance, Inc.,
Defendant.

ORDER DENYING TRUSTEE'S MOTION FOR SUMMARY JUDGMENT

BEFORE THE COURT is the motion of Bettye S. Bedwell, duly appointed Chapter 7 trustee ("Trustee") for summary judgment in the adversary proceeding filed by the Trustee against Capital One Auto Finance, Inc. ("Capital One") seeking to avoid the lien of Capital One as a preferential transfer pursuant to 11 U.S.C. § 547(b). The Trustee asserts that the lien may be avoided because

it was not perfected within twenty days after Jeffery W. Dennison ("Debtor") received possession of the vehicle. Capital One avers in its response to the motion that the contract for sale should be rescinded because financing was not obtained within the seven days required by the Addendum to the sales contract. In the alternative, Capital One argues in its response that since the financing was not completed within seven days, the 20-day period for perfection should not begin until the financing was actually approved.

Based upon the record as a whole, and for the reasons set out below, the motion of the Trustee will be denied. This is a core proceeding. 28 U.S.C. § 157(b)(2)(E) and (F).

FACTS

The facts properly before the court may be summarized as follows. The Debtors filed their petition for relief under Chapter 7 of the Bankruptcy Code on September 21, 2004. The Joint Pretrial Statement provides that the Debtor signed an "Addendum to Sales Contract" dated July 23, 2004, regarding a Nissan X-Terra. The Addendum was appended to the Trustee's motion and provides in part:

> Buyer has entered into a sales contract. Seller agrees to allow buyer to take conditional delivery and possession of the above vehicle subject to the following:
>
> 1. The sales contract is expressly contingent upon Seller successfully obtaining financing from, and assigning to and acceptance by a lender, which lender is regularly used by Seller in its course of business in financing installment sales contracts. This condition must be completed within 7 days of this agreement.
>
> 2. All cleared funds have been received from Buyer by Seller.

> In the event Seller is unable to obtain financing for, assign to, or achieve acceptance by a lender, as set out and described above, or that funds issued by Buyer are insufficient, then Seller, as its option, may request Buyer to surrender the above described vehicle back to Seller or allow Buyer to arrange his/her/their own financing. Buyer shall return the vehicle immediately upon request of Seller in the same or better condition when delivered to Buyer. . . .
>
> Upon return, Seller shall refund all credits, including cash deposits and/or trade in, if any to Buyer after deducting and [sic] all sums that may be due Seller for damages or repairs to the vehicle during Buyer's possession.

Exhibit to Plaintiff's Motion for Summary Judgment.

The parties further agree that the financing was approved by Capital One on August 16, 2004. Neither the Retail Installment Contract nor the vehicle title which is said to note the lien of Capital One was made part of the record. The date the lien was placed on the certificate of title remains a contested fact. (Joint Pretrial Statement, at III). Although the parties state in the Joint Pretrial Statement that Capital One is listed on the Debtors' Schedule D as "a creditor holding a security interest in a 2004 Nissan X-Terra arising from a vehicle invoice and bill of sale entered into by the Debtor and the Defendant on July 23, 2004," neither the vehicle invoice nor the bill of sale were made part of the record. Indeed, no documents have been filed bearing the name of Capital One or any person capable of binding Capital One. The Addendum is signed by a representative of Jim Keras Nissan, Buick & Subaru, not Capital One. Without the Retail Installment Contract, the court cannot determine whether the "sales contract is expressly contingent upon Seller successfully obtaining financing . . ." as the Addendum states, or whether it is the Addendum itself that is intended to condition the contract.

There is no statement in the record from which the court may determine when the Debtor took possession of the vehicle. There is no explanation in the record for the delay in obtaining

financing. With these gaps in the record, the court is unable to determine when and whether a contract came into existence and the terms of any such contract.

ANALYSIS

Pursuant to Federal Rule of Civil Procedure 56(c), made applicable by Federal Rule of Bankruptcy Procedure 7056, a motion for summary judgment is adjudicated based upon the "pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any." A court may only consider facts properly in the record. Facts which may be considered when deciding a motion for summary judgment are those which have been pled in a complaint and admitted in the answer, facts presented by affidavit or other sworn statement, and any facts contained in a joint statement of undisputed facts. Based upon these criteria, the only facts which are ripe for consideration are the date of the Addendum, the contents of the Addendum, and the listing of Capital One on the Debtors' Schedule D.

Federal Rule of Civil Procedure 56(c) further requires that all evidence considered must "show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Specific facts, such as the date the Debtor took possession of the vehicle and the date the lien was placed on the vehicle title remain contested. Genuine issues of material fact remain because the moving party has not produced the necessary evidence to support her claim. Although the Trustee relies upon the court's opinion in *In re Flora J. Thomas Jeans and Derrell T. Jeans,* Case No. 04-24746-JDL, Chapter 7, 2005, she failed to provide a full and complete record from which the court might determine that she is entitled to the relief she seeks.

Conversely, the Defendant asserts a right to rescind the agreement, but has failed to file a counterclaim or assert this right as an affirmative defense. Federal Rule of Civil Procedure 13(a) regarding compulsory counterclaims, made applicable by Federal Rule of Bankruptcy Procedure 7013, states that a party must plead any claims which arise "out of the transaction or occurrence that is the subject matter of the opposing party's claim." Here, Capital One's argument that the contract should be rescinded because financing was not completed within seven days is just such a compulsory claim. In the alternative, a claim of recission may also be pled as an affirmative defense to a complaint. In either event, a right of recission may not be considered if raised for the first time in response to a motion for summary judgment.

CONCLUSION

Based upon the evidence properly presented, genuine issues of material fact remain, and the Trustee's motion for summary judgment is thus **DENIED**.

cc: Debtors
Attorney for Debtors
Trustee
Attorney for Trustee
Defendant
Attorney for Defendant