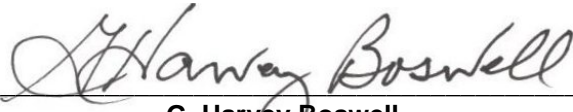


This opinion is not intended for publication



Dated: September 09, 2009
The following is SO ORDERED.


G. Harvey Boswell
UNITED STATES BANKRUPTCY JUDGE

UNITED STATES BANKRUPTCY COURT
WESTERN DISTRICT OF TENNESSEE
EASTERN DIVISION

IN RE

JAMES MICHAEL McDONALD.

CASE NO. 08-10797

Debtor.

Chapter 7

MARIANNA WILLIAMS,

Trustee,

v.

Adv. Pro. No. 08-5250

JAMES MICHAEL McDONALD and
MARY L. McDONALD,

Defendants.

MEMORANDUM OPINION RE: PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT

The Court conducted a hearing on the plaintiff's motion for summary judgment on June 3, 2009. FED. R. BANKR. P. 9014. Resolution of this matter is a core proceeding. 28 U.S.C. § 157(b)(2). The Court has reviewed the testimony from the hearing and the record as a whole. This Memorandum Opinion shall serve as the Court's findings of facts and conclusions of law. FED. R. BANKR. P. 7052.

I. FINDINGS OF FACT

The debtor in this case, James Michael McDonald (“McDonald”), filed his chapter 7 petition on March 3, 2008. On schedule B of his petition, the Debtor listed the following items under item “29. Machinery, fixtures, equipment, and supplies, used in business:”

1993 International Truck Model 930, Vin #2NSFB87R3PC065505
1984 GMC Truck, Vin #1GOE6D1B3EV531369
2001 Blaw Knox ESSP760 Seal Coat Machine #5E1CP17251C000038
1996 United Enclosed Trailer #48B500E161020426
2000 Graco Line Laser Model 3900 #BA863
Honda 3000 Inverter Generator EZGF1059494¹
2003 GPI Trailer 3 axle #1G9FB24303M083518
(2) Billy Goat Blowers Model Q85552 #021897009 & Model QB53HC #041398028
2000 Diamond Asphalt Saw # 1270834

The debtor claimed an exemption of \$8,000 in the 1993 International truck and a combined exemption of \$25,000 in the remaining equipment listed on schedule B under item 29. The debtor listed Mary L. McDonald of 41 Barkwood Cove, Jackson, TN, on schedule D as having two secured claims: (1) a secured claim in the 1993 International Truck in the amount of \$8,000.00 and (2) a secured claim in the amount of \$25,000.00 in the 1984 GMC Truck, the 2001 Blaw Knox Seal Coat Machine, the 1996 United Enclosed Trailer and the 2000 Graco Line Laser. Mary McDonald is the debtor’s mother.

On November 4, 2008, the Chapter 7 Trustee in this case, Marianna Williams (“Williams” or “Trustee”), filed a complaint to avoid preferential transfers and for turnover of property to the estate against the debtor and his mother. In the complaint, the Trustee alleged that the debtor transferred an interest in the 1993 International Truck, the 1984 GMC Truck, the 2001 Blaw Knox Seal Coat Machine, the 1996 United Enclosed Trailer and the 2000 Graco Line Laser to his mother “to secure an antecedent debt while he was insolvent, less than one (1) year before the date of the filing of the petition, thus enabling the Defendant [Mary McDonald] to reserve a higher distribution than she would [have] received as an unsecured creditor in a Chapter 7 case.” The Trustee also alleged that the debtor had provided false or misleading information to the Trustee in an attempt to “hide the true nature of the transfer from the Debtor to her” and that the debtor had failed to turn the property over to the Trustee, pay the value of the property to the Trustee, or make the property available to the Trustee for

¹ The various pleadings and exhibits in this matter refer to the Honda 3000 Generator as a Honda 3000 “inverter” Generator and a Honda 3000 “inverter” Generator. Because of the inconsistencies within the documents, the Court will refer to the generator by omitting the “inverter” or “inverter” reference and just use “Honda 3000 Generator” when referring to that piece of equipment.

inspection. The Trustee also alleged that Mary McDonald had failed to properly perfect her security interest in the vehicles and equipment prior to the debtor's chapter 7 bankruptcy filing. Finally, the Trustee alleged that vehicles and equipment were property of the estate with an estimated value of over \$30,000.00.

The debtor provided Williams with a copy of several documents which Williams then attached as exhibits to her adversary complaint. The first document provided to Williams was a copy of a security agreement dated January 30, 2008, which stated that the debtor was granting his mother a security interest in "One (1) Used 93 International Truck Mod 930 # 2HSFBB7R3PC065505" as security for a note dated January 30, 2008, in the amount of \$15,000.00. The debtor also provided the Trustee with a partial copy of the title for the 1993 International Truck which shows "James Michael McDonald DBA McDonald Asphalt" as the owner and First Bank in Jackson, Tennessee, as the lienholder. At the top of the title there is a handwritten notation which reads "Mary Lynn McDonald 6091387."² The "6091387" note appears to be a reference to a January 29, 2008, loan Mary Lynn McDonald took out with FirstBank. A copy of this note was introduced as collective exhibit 1 at the hearing on the Trustee's motion. None of the parties to this proceeding mentioned the notation to the Court nor did they attempt to explain to the Court what the notation means.

The third exhibit to the Trustee's complaint was a copy of a security agreement dated March 2, 2005, which purported to grant Mary McDonald a security interest in the 1984 GMC Truck, the 2001 Blaw Knox Seal Coat Machine, the 1996 United Enclosed Trailer, the 2000 Graco Line Laser, the Honda 3000 Generator, the 2003 GPI Trailer, two Billy Goat Blowers and one diamond asphalt saw. According to the agreement, Mary McDonald accepted a security interest in this equipment as collateral for a promissory note dated March 2, 2005, in the amount of \$24,460.55.

The fourth exhibit to the Trustee's complaint was a copy of a UCC-1 Financing Statement with a filing date of February 19, 2008. This document states that Mary McDonald is a secured creditor of James McDonald having a secured interest in a 1984 GMC Truck, 2001 Blaw Knox Seal Coat Machine, a 1996 United Enclosed Trailer, a 2000 Graco Line Laser, a Honda 3000 Generator, a 2003 GPI Trailer, two Billy Goat Blowers and one diamond asphalt saw.

²There also is a notation next to the "6091387" which appears to read "S/20;" however, the Court is unable to definitely determine what this notation says or refers to. It could also be "5/20" or some other variation.

The fifth exhibit to the Trustee's complaint is Mary L. McDonald's sworn affidavit dated July 1, 2008, which states that Mary L. McDonald appeared before a notary public and swore that she is the owner of a 1984 GMC C64 Truck, a 2001 Blaw Knox Seal Coat Machine, a 1996 United Enclosed Trailer, a 2000 Graco Line Laser, a Honda 3000 Generator, two Billy Goat Blowers and a 2000 diamond asphalt saw. The affidavit further states that despite the fact that Mary McDonald is the owner of this equipment, James McDonald is using the equipment in "McDonald Asphalt." According to the affidavit, Mary McDonald valued the equipment at \$1,450.00.

The sixth exhibit to the Trustee's complaint is a copy of "Husband's Proposed Property Division" from the debtor's divorce proceedings in the Chancery Court for Madison County, Tennessee. This document is undated; however, the debtor's divorce was pending in the winter of 2007. According to this proposed property division document, James McDonald owned a 1993 International truck and an asphalt paver at the time of his divorce. This document also lists a loan from Mary McDonald to the debtor in the amount of \$110,000.00 under "Husband's Separate Business Equipment."

The seventh exhibit to the Trustee's complaint is a copy of a February 22, 2007, affidavit James Michael McDonald entered in the Chancery Court of Madison County during his divorce proceedings. In this affidavit, McDonald stated that his income from his employment with McDonald Asphalt and Sealing "is difficult to determine," but averaged \$14,329.50 for 2004 and 2005. McDonald also set forth his estimated monthly expenses in exhibit A to his affidavit. According to this exhibit, McDonald estimated his monthly expenses to include \$800 for gasoline for company vehicles and \$408.00 for "repairs/service (business)."

On November 19, 2008, the debtor filed a motion to dismiss the Trustee's adversary proceeding based on the fact that he received a discharge of his debts on October 15, 2008, and that the debt at issue in this adversary proceeding was not excepted from said discharge. The Trustee filed a response to the debtor's motion on December 31, 2008, in which she stated that "the receipt of a discharge does not affect the right of the Trustee to recover property of the estate from the Debtor." The motion to dismiss was initially set on the Court's docket for hearing on December 31, 2008, but has been continued numerous times. It is currently on the Court's calendar for September 16, 2009.

Mary McDonald filed an answer to the Trustee's complaint on January 7, 2009. In that answer, Mary McDonald admitted that the debtor did execute a security agreement on January 30, 2008, in favor of his mother

for the 1993 International Truck. Mary McDonald also admitted that the copy of the title for the International Truck shows Michael McDonald as the owner and First Bank as the lienholder. Mary McDonald admitted that the debtor executed a security agreement on March 2, 2005, giving her a security interest in the 1984 GMC Truck, the 2001 Blaw Knox seal coat machine, the 1996 United trailer, the 2000 Graco line laser, the Honda 3000 Generator, the 2003 GPI Trailer, two Billy Goat Blowers and one diamond asphalt saw. Mary McDonald also admitted that she filed a UCC Financing Statement for this equipment with the secretary of state on February 19, 2008. The serial numbers for each piece of this equipment match the serial numbers for the collateral as listed in the debtor's bankruptcy petition.

Although Mary McDonald admitted some of the allegations set forth in the Trustee's complaint, she denied the remainder of the complaint. In paragraph 6 of her answer, Mary McDonald stated that she "admits that equipment owned by Mr. McDonald was included in his divorce. However, Defendant Mary McDonald denies that the equipment in the divorce decree is the same equipment that is covered by her UCC filings and would demand strict proof thereof." Mary McDonald also stated in paragraph 9 of her answer that she "denies the Trustee is entitled to any interest in the claimed property and demands strict proof thereof." In the final paragraph of her answer to the complaint, Mary McDonald asked the Court to dismiss the adversary proceeding. Michael McDonald never filed an answer to the Trustee's complaint. His attorney filed a motion to withdraw from his representation of the debtor on April 22, 2009. The Court granted that motion on June 2, 2009. As a result, the debtor is currently representing himself in this proceeding.

The Trustee filed a motion for summary judgment in this matter on April 3, 2009. In her motion, the Trustee alleged that there were no genuine issues as to any material fact and that she was entitled to a judgment as a matter of law. The Trustee filed a memorandum in support of her motion which set forth the same facts as her complaint. The Trustee also attached several exhibits to her motion. The first two exhibits were copies of the debtor's bankruptcy schedules B and C showing the debtor's claimed exemptions in the vehicles and equipment at issue in this proceeding as well as the secured claims of Mary McDonald in this collateral. Some of the exhibits to the Trustee's motion were identical to the exhibits attached to her original complaint:

Exhibit D: copy of March 2, 2005, security agreement for the GMC truck, seal coat machine, United trailer, Graco line laser, Honda generator, diamond asphalt saw and the two blowers and copy of February 19, 2008, UCC-1 financing statement for these items (exhibits 3 and 4 to complaint);

Exhibit F: copy of "Husband's Proposed Property Division" from debtor's Madison County divorce proceedings (exhibit 6 to complaint);

Exhibit I: copy of July 1, 2008, Affidavit of Mary L. McDonald (exhibit 5 to complaint).

In addition to the exhibits which were attached to her complaint, the Trustee also included several additional exhibits in her motion for summary judgment. First, the Trustee attached a copy of a January 30, 2008, security agreement between the debtor and his mother which purported to grant Mary McDonald a security interest in the 1993 International Truck (Exhibit C). As payment for this secured transaction, the debtor agreed to pay Mary McDonald's \$15,000.00 loan with FirstBank until the note was paid in full.

The second additional exhibit attached to the Trustee's motion for summary judgment is a copy of a document entitled "Separate Property of Mike McDonald" from the debtor's 2007 state court divorce proceedings in Madison County (Exhibit E). This list includes a 1993 International truck and a 1984 GMC Truck. The listing does not include serial numbers for these vehicles. This document is dated June 6, 2007.

Exhibit G to the Trustee's motion for summary judgment is a copy of a 2006 "Depreciation and Amortization Deposition," IRS form 4562 which was included with a copy of the debtor's 2006 US Individual Income Tax Return which was made an exhibit to a deposition he gave in his divorce proceeding on July 12, 2007. According to this form, the debtor and his ex-wife claimed a \$15,347.00 depreciation for equipment valued at \$30,000 which was being used in an "Asphalt Sealing and Stripping" business.

Exhibit H to the Trustee's motion for summary judgment is a copy of pages 10-12 and 16 from the debtor's July 12, 2007, deposition given in connection with his Madison County divorce proceedings. During that deposition, the debtor testified that he owned a 1993 model dump truck and a 1984 Chevrolet Truck.³ The debtor also testified during the deposition that he owned a seal coat machine and a stripping machine

Exhibit J to the Trustee's motion is a copy of an "Order for Absolute Divorce" entered by the Chancery Court of Madison County on March 26, 2008, which made a division of the parties' debts and property. According to the decree, the debtor was ordered to pay a \$6,460.00 debt on a 1993 International Dump Truck,

³The truck which is the subject of this proceeding is a 1984 GMC truck. Because no one raised the issue at the hearing in this matter, the Court will assume that the 1984 Chevrolet truck referred to in the deposition is the 1984 GMC truck.

a \$24,523.78 debt to Mary McDonald for “‘05-‘06 Living Expenses,” and a \$110,000.00 “loan from Mary McDonald.”

Mary McDonald filed a “Memorandum in Opposition” to the Trustee’s motion on April 14, 2009. In this document, Mary McDonald alleged that the vehicles and equipment at issue in this proceeding have been stored at her real property at 464 Craig Road, Dyersburg, Tennessee, for more than one year. Mary McDonald admitted that she had not perfected her security interest by filing as required by T.C.A. § 47-9-310; however, she alleged that T.C.A. § 47-9-310(b)(6) and T.C.A. § 47-9-313 permit perfection by possession. As support for her opposition to the Trustee’s motion, Mary McDonald attached a copy of a April 13, 2009, affidavit in which she averred that the vehicles and equipment at issue in this case have been stored at her real property at 3661 Old Medina Rd., Oakfield, Tennessee, since March 2005. She also stated that McDonald has never owned the 2003 GPI trailer. Instead, she alleged that she purchased the trailer to haul a tractor and blade to cut the Oakfield property.

The Trustee filed a response to Mary McDonald’s memorandum in opposition on May 27, 2009. Although the Trustee did not dispute that Mary McDonald owns the real property at 3661 Old Medina Road, Oakfield, Tennessee, she did dispute the allegation that the vehicles and equipment in this case have been stored there for over a year. In support of her dispute, the Trustee attached an affidavit of James E. Daniels, Jr., dated May 27, 2009. Daniels is an appraiser who was hired by the Trustee to appraise the vehicles and equipment. According to his affidavit, Daniels made several attempts to see the equipment during the summer of 2008; however, he was told by the debtor’s attorney that the property was being used on an out-of-state job. Once the property was returned to Tennessee, Daniels inspected the vehicles and equipment. The 1993 International Dump Truck was not at the property when Daniels arrived for his appraisal. Additionally, [t]he Blaw Knox seal coat machine had fresh mud on it. Tracks in the snow and mud indicated that it had been moved to the property very recently.”

The Court conducted a hearing on the Trustee’s motion for summary judgment on June 3, 2009. No parties appeared to testify at the hearing. The attorney for Mary McDonald introduced one collective exhibit which included copies of two multipurpose notes and security agreements. Both notes show the borrower as Mary McDonald and the lender as FirstBank. The first note, loan number 6091387, is dated May 20, 2005, in the amount of \$12,150.00. As collateral for this note, Mary McDonald pledged the 1993 International 930 as a Third Party Pledge from James Michael McDonald. This note matured on May 20, 2008.

The second part of the collective exhibit is a copy of a note and security agreement dated January 29, 2008, in the amount of \$15,000.00. As security for this note, Mary McDonald pledged a “used 1993 International 930” and a “used 2001 Blowknox Sealant.” The notation “Third Party Pledge–James Michael McDonald” appears directly below the description of the pledged collateral. According to the bottom of the note, the January 29, 2008, loan was secured by “Certificates of Title/Third Party Pledge.” The purpose of this loan is listed as “purchase 2001 Sealant and payoff 6091387.”

At the hearing in the case at bar, the Trustee argued that there is no dispute as to the material facts in this case. The exhibits to the Trustee’s complaint and motion as well as the schedules filed by the debtor all definitively show that the debtor is the owner of the various equipment and vehicles. The debtor listed the property on his bankruptcy schedules as being his property. The Trustee asserted that both the 1993 International Truck and the asphalt sealing machine are titled in the debtor’s name. The Trustee provided a partial copy of the title for the 1993 International Truck as an exhibit to her complaint and motion; however, neither the Trustee nor the defendants provided the Court with a copy of the title for the asphalt sealing machine.

The Trustee also argued that Mary McDonald failed to perfect her interest in the 1993 International Truck and failed to timely perfect her security interest in the remaining equipment. At the hearing on the Trustee’s motion, Mary McDonald argued that she had perfected her security interest in the equipment and vehicles by having possession of the property as permitted by T.C.A. §§ 47-9-310(b)(6) and 47-9-313. The Trustee disputed Mary McDonald’s alleged perfection by possession for three reasons. First, the Trustee argued that a secured creditor cannot perfect a security interest in a motor vehicle by possession under Tennessee law. Secondly, the Trustee argued that T.C.A. § 47-9-313 does not allow for perfection by possession of business equipment. It only allows perfection by possession for tangible negotiable documents, goods, instruments, money or tangible chattel paper. Lastly, the Trustee argued that even if T.C.A. § 47-9-313 allowed for perfection by possession of the property at issue in this case, Mary McDonald did not have true possession of the property because it was not at her property at all times. When the debtor took the equipment and vehicles off Mary McDonald’s property in order to work on a job site, Mary McDonald lost possession and, thereby, perfection of her security interest.

In response to the Trustee’s argument regarding perfection by possession, Mary McDonald argued that she did have possession of the property even though it was not at her residence at all times. According to Mary McDonald, “possession” as used in T.C.A. § 47-9-313 means that the secured party has control over the property

at all times. It does not require actual constant physical possession of the property. Because the property was stored at her property at her direction, Mary McDonald had the requisite possession of the property to perfect her security interest. As support for her argument, Mary McDonald directed the Court's attention to the case of *Marlow v. Rollins Cotton Co. (In re Julien Co.)*, 146 F.3d 420 (6th Cir. 1998). Mary McDonald acknowledged that this case dealt with possession of paper documents, but asserted that the *Julien* case still stands for the proposition that if possession of an item has taken place, it puts the world on notice that the possessing party has a secured interest in the property. The Trustee disputed Mary McDonald's claims that the *Julien* case had any applicability to the present case. *Julien* involved warehouse receipts for cotton, not the cotton itself. Therefore, according to the Trustee, its rule of possession would not apply to the case at bar

Despite having possession of the collateral, Mary McDonald filed a UCC-1 Financing Statement with the Tennessee Secretary of State on February 19, 2008, for the 1984 GMC Truck and all other equipment at issue in this case. The UCC-1 did not list the 1993 International Truck. The security agreement which granted Mary McDonald an interest in the 1984 GMC Truck and all other equipment⁴ was executed on March 2, 2005. The 1993 International Truck was not included in the March 2, 2005, security agreement nor was it listed as collateral on the UCC-1 Financing Statement. At the hearing, Mary McDonald asserted that although the UCC-1 Financing Statement purported to secure the March 2005 security agreement between the debtor and herself, it was meant to perfect the security interest created by the January 2008 note. The Court finds this argument wholly without merit because the March 2005 security agreement listed the 1984 GMC Truck and the equipment and trailers used in the debtor's asphalt sealing business as collateral. The UCC-1 filed with the secretary of state also lists this GMC truck and equipment. Neither the March 2005 note nor the UCC-1 Financing Statement list the 1993 International Truck. The January 2008 security agreement between the debtor and Mary McDonald is not secured by any property other than the 1993 International Truck. Additionally, the only collateral listed on the May 2005 and January 2008 notes and security agreements between FirstBank and Mary McDonald is the 1993 International Truck. The only document and transaction which granted Mary McDonald an interest in the 1984 GMC Truck and the asphalt sealing business equipment is the March 2, 2005, security agreement executed by the debtor and Mary McDonald.

⁴ Any references to "all other equipment" or "asphalt sealing business equipment" refer to the 2001 Blaw Knox seal coat machine, 1996 United Enclosed trailer, 2000 Graco Line Laser, Honda 3000 Generator, two Billy Goat blowers, 2003 GPI Trailer, and the 2000 Diamond Asphalt Saw.

Lastly, the Trustee argued that the facts in this case firmly establish the necessary elements of a 11 U.S.C. § 547 preference action. First, the copies of pleadings and depositions from the debtor's 2007 divorce action in Madison County all show that the debtor had two outstanding debts to his mother: one for "2005 - 2006 Living Expenses" in the amount of \$24,523.78 and one for a loan from Mary McDonald in the amount of \$110,000. As a result, the two transfers at issue in this case, (1) the January 30, 2008, security agreement executed by the debtor in favor of his mother for \$15,000.00 secured by the 1993 International Truck and (2) the February 19, 2008, filing of the UCC Financing Statement by Mary McDonald for the 1984 GMC Truck and asphalt sealing business equipment, were made on account of antecedent debts. The Trustee also alleges that the proceedings in the debtor's 2007 divorce action demonstrate that he was insolvent at the time he made the transfers to his mother. Lastly, the Trustee argues that by transferring the security interest to his mother, the debtor insured that Mary McDonald would receive more money than if she were a general unsecured creditor in a chapter 7 case.

II. CONCLUSIONS OF LAW

A. SUMMARY JUDGMENT

Summary judgment is appropriate when "the pleadings, the discovery and disclosure materials on file, and any affidavits 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." FED. R. CIV. P. 56(c), made applicable to bankruptcy proceedings by FED. R. BANKR. P. 7056. "The moving party has the burden of proving that no genuine issue as to any material fact exists and that it is entitled to a judgment as a matter of law." *R.S.W.W., Inc., v. City of Keego Harbor*, 397 F.3d 427, 433 (6th Cir. 2005). A moving party can meet its burden under Rule 56(c) by "identifying those parts of the record that demonstrate the absence of any genuine issue of material fact." *Moldowan v. City of Warren*, 2009 WL 1872284, *12 (6th Cir. 2009) (citing *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986)). With regard to an issue for which the moving party does not bear the burden of proof at trial, however, "the moving party may meet its burden by showing 'that there is an absence of evidence to support the nonmoving party's case.'" *Id.; Cleveland v. Policy Mgmt Sys. Corp.*, 526 U.S. 795, 805-06 (1999). "By its very terms, this [Rule 56(c)] standard provides that the mere existence of *some* alleged factual dispute between the parties will not defeat an otherwise properly supported motion for summary judgment; the requirement is that there be no *genuine* issue of *material* fact." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247 - 48 (1986).

Once the moving party has demonstrated that there are no genuine issues as to any material facts, the “nonmoving party ‘must show sufficient evidence to create a genuine issue of material fact.’” *Klepper v. First American Bank*, 916 F.2d 337, 342 (6th Cir. 1990). The nonmoving party cannot rely on “[a] mere scintilla of evidence” in order to satisfy its burden under Rule 56(c). *Prebilich-Holland v. Gaylord Entm’t Co.*, 297 F.3d 438, 442 (6th Cir. 2002); *Moldowan*, 2009 WL 1872284 at *12 (the nonmoving party “must do more than simply show that there is some metaphysical doubt as to the material facts.”). Rather, the nonmoving party must present evidence on which a jury [or the trier of fact] could reasonably find for the nonmovant. *Anderson.*, 477 U.S. at 248. The existence of a dispute over “irrelevant” or “unnecessary” facts will not defeat a summary judgment motion. *Id.* The substantive law of a particular case will determine which facts are material and which are not. *Id.*

“[A]t the summary judgment stage the judge’s function is not himself to weigh the evidence and determine the truth of the matter but to determine whether there is a genuine issue for trial.” *Anderson*, 477 U.S. at 249. When considering a motion for summary judgment, a court must view all the facts and make all reasonable inferences in favor of the non-moving party. *Matsushita Elec. Indus. Co., Ltd. v. Zenith Radio Corp.*, 475 U.S. 574, 587 - 88 (1986); *Williams v. Mehra*, 186 F.3d 685, 869 (6th Cir. 1999). In addressing a motion for summary judgment, the court does not have a “duty to search the entire record to establish that it is bereft of a genuine issue of material fact.” *Street v. J.C. Bradford & Co.*, 886 F.2d 1472, 1479 - 80 (6th Cir. 1989). Instead, the “nonmoving party has an affirmative duty to direct the court’s attention to those specific portions of the record upon which it seeks to rely to create a genuine issue of material fact.” *LePage v. Board of Trustees of Thorn Twp.*, 2005 WL 3274873, *2 (S.D. Ohio 2005); *Guarino v. Brookfield Twp. Trustees*, 980 F.2d 399, 404 (6th Cir. 1992).

In the present case, the Court finds that no genuine issue of material fact exists. Summary judgement is, therefore, appropriate.

B. 11 U.S.C. § 547 Preference Action

1. Elements of Preference Action

Under § 547(b) of the Bankruptcy Code, a trustee may avoid certain pre-petition transfers of “an interest of the debtor in property.” 11 U.S.C. § 547(b). The purpose of this statute is to reclaim property for the benefit

of the bankruptcy estate so that there is more property available for distribution to creditors. “ ‘Property of the debtor’ subject to the preferential transfer provision is best understood as that property that would have been part of the estate had it not been transferred before the commencement of the bankruptcy proceedings.” *Begier v. I.R.S.*, 496 U.S. 53, 58 (1990). Essentially, anything that would qualify as “property of the estate” under § 541 had it not been transferred pre-petition may be subject to a preference action by a trustee. *Chase Manhattan Mortgage Corp. v. Shapiro (In re Lee)*, 530 F.3d 458, 464 (6th Cir. 2008).

There are five elements to a § 547(b) claim. First, the transfer must have been made “to or for the benefit of a creditor.” 11 U.S.C. § 547(b)(1). Second, the transfer must have been made “for or on account of an antecedent debt owed by the debtor before such transfer was made.” 11 U.S.C. § 547(b)(2). Third, the transfer must have been “made while the debtor was insolvent.” 11 U.S.C. § 547(b)(3). Fourth, the transfer must have been made “on or within 90 days before the date of the filing of the petition” or “between ninety days and one year before the date of the filing of the petition, if such creditor at the time of such transfer was an insider.” 11 U.S.C. § 547(b)(4)(A) and (B). An “insider” is defined by the Bankruptcy Code to include a “relative of the debtor” if the debtor is an individual. 11 U.S.C. § 101(31)(A). The last element of a preference action is that the transfer must have enabled the creditor to receive more than he would have received if the case were a chapter 7 case, the transfer had not been made, and the creditor received payment of the debt “to the extent provided by the provisions of this title.” 11 U.S.C. § 547(b)(5)(A) - (B). The trustee bears the burden of proof on each of these five elements and must establish each element by a preponderance of the evidence. 11 U.S.C. § 547(g); *Triad Int’l Maint. Transp., Inc. v. Southern Air Transp. (In re Southern Air Transp.), Inc.*, 511 F.3d 526, 535 (6th Cir. 2007). Determination of each element of a preference action is a question of material fact. *Derryberry v. Albers (In re Albers)*, 67 B.R. 530, 534 (Bankr. N.D. Ohio 1986).

Although a pre-petition transfer of property may have been made by the debtor, a trustee may not avoid the transfer if it falls into one of the enumerated exceptions in 11 U.S.C. § 547(c). The exceptions include (1) transfers which were made as a contemporaneous exchange for new value (“contemporaneous exchange” defense), (2) transfers made in the ordinary course of business (“ordinary course of business” defense), (3) transfers that create a security interest in property acquired by the debtor (“enabling loans” defense), (4) transfers where a creditor provides new value after a preferential transfer is made but before the filing of the debtor’s bankruptcy petition (“new value” defense), (5) transfers that create a perfected security interest in inventory, a receivable, or the proceeds of either (“improvement in position” defense), (6) a transfer which fixes a statutory lien that is not avoidable under § 545, (7) transfers that are bona fide payments for a domestic support obligation,

(8) a transfer by a debtor whose debts are primarily consumer debts of property that is valued at less than \$600, and (9) a transfer by a debtor whose debts are not primarily consumer debts of property that is valued at less than \$5,475.00. 11 U.S.C. § 547(c)(1) - (9). The creditor asserting an exception to a preference action bears the burden of proof, by a preponderance of the evidence, on the applicability of an exception. 11 U.S.C. § 547(g); *Luper v. Columbia Gas of Ohio, Inc. (In re Carled, Inc.)*, 91 F.3d 811, 813 (6th Cir. 1996).

2. Perfection of Security Interests

The first element of a § 547(b) preference action is that there be a “transfer of an interest of the debtor in property to or for the benefit of a creditor.” 11 U.S.C. § 547(b). The granting of a security interest qualifies as such a transfer. *Walker v. Ford Motor Credit Co. (In re Clark)*, 112 B.R. 226, 228 (Bankr. E.D. Tenn. 1990); see also, 11 U.S.C. § 101(54) (“The term ‘transfer’ means – (A) the creation of a lien; . . . (D) each mode, direct or indirect, absolute or conditional, voluntary or involuntary, of disposing or of parting with – (i) property; or (ii) an interest in property.”). The filing of a UCC financing statement also qualifies as a “transfer” within the meaning of 11 U.S.C. § 547(b). *Bavely v. Wandstrat (In re Harbour Lights Marina, Inc.)*, 146 B.R. 963, 972 (Bankr. S.D. Ohio 1992). Both of these transactions qualify as “transfers” under § 547 “because the granting of a security interest improves the position of the grantee with respect to general unsecured creditors.” *Id.* (citing *In re Compton Corp.*, 831 F.2d 586, 594- 95 (5th Cir. 1987)).

Pursuant to 11 U.S.C. § 547(e), a transfer is deemed to be made when the transfer takes place if it is perfected within thirty days of the transfer. If perfection of the transfer does not occur within thirty days then the transfer is deemed to be made when the transfer is perfected. 11 U.S.C. § 547(e)(2)(A) and (B). If a transfer is not perfected within thirty days of the transfer or by the filing date of a bankruptcy petition, whichever date is later, then the transfer is deemed to take place “immediately before the date of the filing of the petition.” 11 U.S.C. § 547(e)(2)(c). So long as the underlying security interest was created by the debtor more than thirty days prior to filing for bankruptcy relief, a security interest which remains unperfected at the time a bankruptcy petition is filed will be deemed to occur immediately before the filing of the bankruptcy petition.

In the case at bar, Mary McDonald claims a security interest in two separate sets of collateral. First, she claims a security interest in the 1993 International truck based on the January 30, 2008, security agreement executed in her favor by the debtor. McDonald granted this security interest as collateral for a \$15,000.00 loan from his mother. Second, Mary McDonald claims a security interest in the 1984 GMC truck and the paving

equipment (the 2001 Blaw Knox Seal Coat Machine, the 1996 United Enclosed Trailer, the 2000 Graco Line Laser, the Honda 3000 Generator, the 2003 GPI Trailer, two Billy Goat Blowers and the diamond asphalt saw) pursuant to a March 2, 2005, promissory note in the amount of \$24,460.55. Mary McDonald asserts that she has perfected her interest in these pieces of collateral by possession pursuant to T.C.A. § 47-9-310(b)(6). Mary McDonald did not file a UCC financing statement until February 19, 2008. The financing statement purported to cover the 1984 GMC Truck, 2001 Blaw Knox sealer, 1996 United trailer, 2000 Graco line laser, Honda 3000 generator, two Billy Goat blowers, 2003 GPI trailer, and a 2000 Diamond Asphalt Saw. It did not list the 1993 International truck.

The Trustee has asserted that the transfer, for purposes of this adversary proceeding, occurred when Mary McDonald attempted to perfect her security interest by filing the UCC financing statement on February 18, 2008. Mary McDonald disagrees and has instead alleged that she perfected her security interest in the collateral by taking possession of it and storing it at her real property at some time prior to the filing of this case. Resolution of when, if ever, the perfection of Mary McDonald's security interest occurred is a vital element of the Trustee's summary judgment motion.

Perfection of security interests in Tennessee is governed by Article 9 of the Uniform Commercial Code as set forth at T.C.A. § 47-9-101 et seq. T.C.A. § 47-9-303 defines the perfection of security interest on goods covered by a certificate of title. Perfection of security interests in property subject to certain statutes, and regulations is outlined in T.C.A. § 47-9-311.

a. Perfection of security interests in motor vehicles

Perfection of a security interest in a motor vehicle may not be had by mere possession. T.C.A. § 55-3-126. Instead, a party wishing to perfect a security interest in a motor vehicle is required to file "an application for a certificate of title containing the name and address of the holder of a security interest or lien with vehicle description and the required fee." T.C.A. § 55-3-126(b)(1). Such a security interest is perfected on the date the application and fee are delivered to the requisite office. T.C.A. § 55-3-126(b)(2). "Notwithstanding any other law to the contrary, a second or other junior security interest or lien in a vehicle of the type for which a certificate of title is required shall not be considered perfected unless and until the lien or security interest is physically noted on the certificate of title for the vehicle." T.C.A. § 55-3-126(3)(A).

In the case of *In re Groves*, 75 B.R. 227 (M.D. Tenn. 1987), the district court affirmed the bankruptcy court's determination that possession of truck tractors was insufficient to perfect a lien. *Id.* at 228. The district court noted that Tennessee Motor Vehicle Title and Registration Law is the exclusive method of perfecting that lien with the exception of liens "depending upon possession." *Id.* The district court concurred with the bankruptcy court's interpretation that the exception "means liens depending upon possession for their existence, i.e. artisan's liens rather than liens depending upon possession for perfection, i.e., pledges" and the district court then opined if the Tennessee legislature wishes to allow perfection of motor vehicles by possession, "T.C.A. § 55-3-126 should be amended to clearly exclude liens depending upon possession for perfection including pledged motor vehicles." *Id.* Compliance with the Tennessee motor vehicle and registration statutes remains "the exclusive method for perfecting a security interest in automobiles not part of inventory." *In re Morgan*, 291 B.R. 795, 802 (Bankr. E.D. Tenn. 2003).

The certificate of title for the 1993 International Truck provided to the court lists James Michael McDonald DBA McDonald Asphalt as the owner and First Bank in Jackson as the lienholder. No evidence of Mary McDonald's position as a creditor or as a junior lienholder is noted on the certificate of title. McDonald granted his mother a security interest in the 1993 International on January 30, 2008, which was more than thirty days prior to the filing of McDonald's chapter 7 bankruptcy case. Mary McDonald did not comply with the certificate of title requirements for the 1993 International.

None of the parties to this proceeding presented any certificate of title for the 1984 GMC truck to the Court. Mary McDonald did not allege that her lien on the 1984 GMC was noted on the certificate of title. Instead, she alleged that she perfected her security interest in the GMC by possession. As a result, the Court finds that the proof in this case clearly establishes that Mary McDonald did not comply with the requirements of Tennessee law which mandate notation on the certificate of title to perfect a security interest in the 1984 GMC.

Based on these conclusions, the Court finds that Mary McDonald's security interests in the 1993 International and the 1984 GMC were unperfected at the time McDonald filed his chapter 7 petition on March 3, 2008. Consequently, McDonald's granting of a security interest in the vehicles to his mother is deemed to have been made immediately prior to the filing of his petition for bankruptcy relief.

b. Perfection of Security Interest in Asphalt Paving and Sealing Equipment

Mary McDonald has alleged that she perfected her security interest in the 2001 Blaw Knox sealer, 1996 United trailer, 2000 Graco line laser, Honda 3000 generator, two Billy Goat blowers, 2003 GPI trailer, and the Diamond Asphalt Saw (collectively referred to hereinafter as “asphalt equipment”) by taking possession of the collateral and storing it at her real property. Section 47-9-310 of the Tennessee Code Annotated states the general rule that security interests must be perfected in Tennessee by filing; however, if a security interest falls within one of the delineated exceptions of T.C.A. § 47-9-310(b), filing is not necessary for perfection. “Tangible negotiable documents, goods, instruments, money or tangible chattel paper” in the possession of a secured party fall within one of § 47-9-310(b)’s exceptions and may be perfected by the creditor taking possession of the property. T.C.A. §§ 47-9-310(b)(6) and 47-9-313. Perfection by possession is allowed by the Uniform Commercial Code because “possession of goods by a creditor [and the debtor’s lack thereof] is an effective means of putting future creditors or purchasers on notice that the property is encumbered.” *Southern Air*, 511 F.3d at 532. “Thus, in order to effect perfection, possession must be ‘unequivocal, absolute and notorious, so that third parties may be advised.’” *Hutchison v. C.I.T. Group*, 726 F.2d 300, 302 (6th Cir. 1984). Thus, once a secured party perfects his security interest by taking possession of collateral, perfection of such a security interest continues “only while the secured party retains possession.” T.C.A. § 47-9-313(d).

Mary McDonald contends that she perfected her interest by possession pursuant to T.C.A. § 47-9-310(b)(6) and T.C.A. § 47-9-313. Possession is not defined in the Uniform Commercial Code. “Traditionally, possession of personal property in the law of security interests has been important because of the notice it gives to prospective creditors, a fundamental policy of this branch of law. Few debtors can afford to give up possession in order to enable their creditors to perfect security interests. A debtor needs its equipment and inventory to stay in business; it could hardly give possession of its motor vehicles to a creditor in order to perfect that interest. Only unusual collateral--collateral not "used" by the debtor--is likely to be perfected by possession.” *White & Summers*, Uniform Commercial Code § 31-8 (5th ed.).

T.C.A. 47-9-205 states that when a security interest is not invalid or fraudulent, the use of collateral by the debtor is permissible; however, T.C.A. 47-9-205(b) specifically states that this section does not relax the requirements for possession if attachment, perfection, or enforcement of a security interest depends on possession of the collateral by the secured party. The purpose of permitting perfection by possession is to give notice to

third parties that the creditor has an interest in the collateral. *Hutchison v. C.I.T. Group*, 726 F.2d 300, 302 (6th Cir. 1984).

In the present case, the debtor did not give up possession of his vehicles or equipment to the purported secured party. Instead, the debtor continued to use the vehicles and equipment in his business. It is undisputed that the debtor had use of the vehicles and/or equipment during the period that Mary McDonald claims possession of the vehicles and goods. The debtor's use of the equipment and vehicles thereby defeated any possible notice to third parties and invalidated Mary McDonald's claim of perfection by possession.

The court does not need to address whether perfection of equipment by possession is authorized under T.C.A. §§ 47-9-310(b)(6) and 47-9-313. Mary McDonald did not maintain possession of the equipment. It is undisputed that James McDonald continued to use the equipment. Mary McDonald did not perfect her security interest in the trucks, trailers or equipment by possession.

Although Mary McDonald did not perfect her security interest in the asphalt equipment by possession, she did file a UCC financing statement on February 19, 2008. This financing statement purported to cover the 1984 GMC Truck, 2001 Blaw Knox sealer, 1996 United trailer, 2000 Graco line laser, Honda 3000 generator, two Billy Goat blowers, 2003 GPI trailer, and a 2000 Diamond Asphalt Saw. The Trustee has asserted that the transfer, for purposes of this adversary proceeding, occurred when Mary McDonald attempted to perfect her security interest by filing the UCC financing statement on February 19, 2008. As noted previously, Mary McDonald is unable to perfect a security interest in the 1984 GMC truck, or in other vehicles requiring certificates of title, since she did not evidence her lien on the certificate of title. With regard to the asphalt equipment, Mary McDonald perfected her security interest in the collateral on February 19, 2008, when she filed her UCC-1 Financing Statement.

The debtor gave his mother a security interest in the asphalt equipment on March 2, 2005, when the security agreement was executed. Mary McDonald did not perfect this security interest until February 19, 2008, when she filed the UCC Financing Statement. Perfection did not occur within thirty days of the granting of the security interest so the transfer of the debtor's interest in the asphalt equipment is deemed to have occurred on February 19, 2008.

3. Remaining elements of § 547 action

As stated supra, there are five elements to a § 547(b) claim: (1) the transfer must have been made “to or for the benefit of a creditor;” (2) the transfer must have been made “for or on account of an antecedent debt owed by the debtor before such transfer was made;” (3) the transfer must have been “made while the debtor was insolvent;” (4) the transfer must have been made “on or within 90 days before the date of the filing of the petition” or “between ninety days and one year before the date of the filing of the petition, if such creditor at the time of such transfer was an insider;” and (5) the transfer must have enabled the creditor to receive more than he would have received if the case were a chapter 7 case, the transfer had not been made, and the creditor received payment of the debt “to the extent provided by the provisions of this title.” 11 U.S.C. § 547(b)(1) - (5).

The Court has already found that the first element of the preference action has been satisfied. The debtor transferred an interest to his mother in the 1993 International truck, the 1984 GMC truck and the asphalt equipment. Because Mary McDonald did not perfect her security interests in the 1993 International or the 1984 GMC, the transfers are deemed to occur immediately prior to the debtor filing his bankruptcy petition. With regard to the asphalt equipment, the transfer is deemed to have occurred on February 19, 2008.

Turning to the second element of a preference action, the Court finds that these transfers were made on account of an antecedent debt. Mary McDonald is a creditor of the debtor by virtue of the March 2, 2005, loan in the amount of \$24,460.55. The debtors’ divorce documents from 2007 indicate that he owed his mother somewhere in the neighborhood of \$110,000.00 at that time.

The third element of a preference action is that the transfer was made while the debtor was insolvent. By the terms of the Bankruptcy Code, a debtor is presumed to be insolvent “during the 90 days immediately preceding the date of the filing of the petition.” 11 U.S.C. § 547(f). Because the transfer of the debtor’s interests in the vehicles is deemed to have occurred immediately prior to the filing of the petition and because Mary McDonald did not perfect her interest in the asphalt equipment until February 19, 2008, the transfers in this case were made within the 90 day presumed insolvent phase.

The fourth element of a preference action is that the transfer was made on or within 90 days before the filing of a petition for bankruptcy relief. In this case, Mary McDonald did not perfect her security interests in the vehicles so the transfer of the debtor’s interests in the vehicles occurred immediately prior to the filing of the

petition. March McDonald did not perfect her security interest in the asphalt equipment until she filed the UCC Financing Statement on February 19, 2008. The petition in this case was filed on March 3, 2008. As a result, the three transfers at issue in this case clearly occurred within 90 days of the petition filing date.

The fifth and final element of a preference action is that the transfer enabled the creditor to receive more than he would have received if the case were a chapter 7 proceeding, the transfer had not been made and the creditor received payment of the debt "to the extent provided for by this title." 11 U.S.C. § 547(b)(5)(A) - (B). If Mary McDonald receives the benefit of these transfers, she would receive a greater benefit than other general unsecured creditors.

The Court therefore concludes that Mary McDonald is an unsecured creditor of the debtor who is in possession of property of the estate. The trustee has established that any purported interest of Mary McDonald is either not perfected or is avoided under 11 U.S.C. § 547 as a preferential transfer. None of the enumerated exceptions of 11 U.S.C. § 547(c) apply in this case.

C. 11 U.S.C. § 542

Section 542 of the Bankruptcy Code provides for turnover of property of the estate to the trustee. In a proceeding under 542(a), the trustee is required to prove that: (1) during the case, (2) an entity other than a custodian, (3) was in possession, custody or control, (4) of property that the trustee could use, sell or lease; and (5) that such property is not of inconsequential value to the estate. *In re Patton*, 200 B.R. 172 (Bankr.N.D. Ohio 1996). In the case at bar, the trustee has established that Mary McDonald is holding property in which she does not have a perfected security interest and she is not acting as a custodian of the estate. The trustee has estimated the value of the disputed property to be in excess \$30,000 thereby establishing that the trustee could use, sell or lease the property and that it has value.

The trustee has also met elements of 11U.S.C § 542 for turnover of property to the estate. Since perfection of the vehicles or goods has not occurred, the trustee is entitled to recover the property under 11U.S.C § 542.

An order will be entered herewith granting the trustee's motion for summary judgment. Pursuant to 11 U.S.C. § 547(b), the trustee may avoid the transfers of the debtor's interests in the 1993 International truck, the

1984 GMC truck, the 2001 Blaw Knox Seal Coat Machine, the 1996 United Enclosed Trailer, the 2000 Graco Line Laser, the Honda 3000 Generator, the 2003 GPI Trailer, two Billy Goat Blowers and the diamond asphalt saw in favor of Mary McDonald. Mary McDonald will be ordered to turn all of this collateral over to the trustee pursuant to 11 U.S.C. § 542.

cc:

Marianna Williams, Chapter 7 Trustee
Danny Ellis, attorney for Mary McDonald
debtor
U.S. Trustee