

IN THE STATE COURT OF DEKALB COUNTY
STATE OF GEORGIA

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|------------------------------|---|----------------------|
| ASSOCIATED FEDERAL EMPLOYEES | * | CIVIL ACTION |
| CREDIT UNION, | * | |
| Plaintiff, | * | FILE NO. 00A-64629-1 |
| | * | |
| v. | * | |
| | * | |
| CASHLAND U.S.A, INC., | * | |
| Defendant. | * | |

ORDER

This is an action for foreclosure of personal property brought by the Plaintiff (Associated) against the Defendant (Cashland). Associated's Complaint, including the attachment, filed February 11, 2000, alleges Cashland is in possession of an automobile serving as collateral for a contract between Associated and ██████████ Jenkins dated September 21, 1995. Pursuant to the security agreement that is part of the contract, Associated retained the right to repossess the vehicle securing the contract if Ms. Jenkins did not make her loan payments. The vehicle is a 1993 Isuzu Utility Rodeo, VIN ██████████. (Associated amended its Complaint March 6, 2000 to add a request attorney's fees.)

Cashland was served with the Summons and Complaint February 15, 2000. A timely Answer was filed February 22, 2000 (and an amended Answer filed March 8, 2000) in which Cashland alleged it made a loan to Ms. Jenkins in February 1996, was at that time presented with a lien free title to secure the loan, and had the superior claim to the vehicle.

I. THE FACTS

The relevant facts are not in dispute. The evidence of record shows the original title was

issued to Ms. Jenkins January 10, 1996 following her purchase of the vehicle September 28, 1995. There is no lien reflected on the title, which along with the registration, was filed by the selling dealer, McNamara Pontiac-GMC Truck, Inc. The registration, on form MV-1, does show Associated to be the lienholder.

In February 1996, Cashland, acting as a licensed pawn broker, made its loan to Ms. Jenkins and retained the title as security. This is the title that had been returned to Ms. Jenkins upon which Associated's lien had mistakenly not been filed or listed.

A replacement tile was issued August 28, 1996 to Associated reflecting its security interest. The certificate of title reflects on its face that it is a replacement title and potentially subject to prior claims. This title was returned to Associated. (Apparently, Ms. Jenkins cooperated in this endeavor by signing the appropriate MV-1 form for Associated. She has not made an appearance in this case.)

In April 1998, Cashland, by then aware of Associated's claim, executed and forwarded to Associated a Certificate of Title Notice as required by O.C.G.A. §40-3-53 to perfect its lien. Cashland complied with this request by forwarding an appropriate MV-1 to the Department of Motor Vehicles. On April 23, 1998, a second replacement title was issued showing Cashland to be the second lienholder. On or about May 28, 1999, Cashland took possession of the vehicle when Ms. Jenkins fell behind in her loan.

II. THE LAW

A security interest in a vehicle is perfected by delivery to the Department of Motor Vehicles. If delivery takes place within 20 days of creation of the security interest, the date of perfection relates back to the date of creation. If delivery takes place after the 20 day window,

the security interest is perfected as of the date of filing. O.C.G.A. §40-3-50(b). In any event, the creditor retains a security interest; failure to file that interest in a timely manner simply subjects the creditor to possible claims of other lienholders. Consequently, Associated's lien was perfected August 28, 1996 when the replacement title was issued.

Cashland, acting as a licensed pawn broker, acquired its lien by operation of law. O.C.G.A. §44-14-320(11). Pawn brokers may make loans taking motor vehicles as security. O.C.G.A. §44-12-130(5). They also may take possession of secured vehicles upon default as long as they do not breach the peace. O.C.G.A. §44-12-131(3).

The law provides for the perfection of liens, created by operation of law, such as Cashland's. Pursuant to O.C.G.A. §40-3-53(a), the holder of the lien may fill out the appropriate paperwork, forward it to another lienholder if necessary, and have the lien recorded. Cashland took advantage of this provision when it recorded its lien on April 23, 1998.

The Motor Vehicle Certificate of Title Act, O.C.G.A. §40-3-1, et. seq. provides the exclusive method of "perfecting and giving notice of security interests and liens with respect to motor vehicles as to which certificates of title need be obtained ..." O.C.G.A. §40-3-58.

Cashland was unaware of Associated's unperfected lien when it loaned money to Ms. Jenkins. Associated knew of Cashland's loan when it secured the first replacement title August 28, 1996. Nevertheless, Associated was first to perfect its title. Cashland could have beaten Associated to the punch when it made the initial loan to Ms. Jenkins in February 1996. For whatever reason, Cashland chose not to do so. Consequently, if this dispute is decided entirely under the Motor Vehicle Certificate of Title Act, Associated wins.

Cashland, however, frames the issue as whether the security interest obtained by

Associated is valid as against the lien obtained by Cashland under the relevant title pawn law. Cashland maintains Associated's security interest was not valid against Cashland until filed and by that time, Cashland's lien had attached. Essentially, says Cashland, it is not a "subsequent creditor" under O.C.G.A. §40-3-50(a) against whom Associated is protecting its lien but rather, a prior creditor.

One wonders what Cashland's position would be if, for example, Ms. Jenkins had obtained a duplicate title and used it to fund another loan in May 1996, the time period in between Cashland's loan and Associated's perfection of its security interest. Under Cashland's theory, such a subsequent borrower would have priority over Cashland which would find itself in the position of a "prior creditor."

The Certificate of Title Act is designed to avoid all of this. Except with respect to special designated circumstances, such as mechanic's liens, filing is required to perfect a motor vehicle lien. Had Cashland filed its lien when it loaned money to Ms. Jenkins, its lien would have had priority. It may be that pawn brokers such as Cashland prefer not to file liens because of the extra time and expense it takes to add the lien and subsequently remove it upon redemption. The risk of that course of action, however, is the possibility a superior lien may be filed.

Any question about whether the pawn shop statute is subject to the Certificate of Title Act was answered in Cobb Center Pawn & Jewelrey Brokers v. Gordon, 242 Ga. App. 73 (2000). In that case, the pawn broker was the first lender but failed to file its security interest. The owners of the car obtained a duplicate title and sold the car to a dealer who resold it to the Gordons who filed their title. The pawn shop later repossessed the car from the Gordons and was held liable for conversion. The Court made clear the pawn broker could have avoided the

problem by filing its lien.

While the mistake in this case is unfortunate, Cashland could have avoided the situation in which it now finds itself had it filed its lien. Associated's lien has priority.

IT IS ORDERED that Associated's request for a writ of possession be granted. Its motion for attorney fees is denied. Cashland shall return the vehicle currently in its possession to Associated on or before the day following the expiration of any applicable appeal period. Should an appeal be filed, such appeal shall act as a supersedeas and Cashland is ordered to retain the vehicle on its premises until the conclusion of any such appeal.

This Order constitutes a final judgment in this action. Any appeal period shall commence on the date on which this order is filed. This September 3, 2002.

GARY LESHAW, Judge
State Court of DeKalb County, by designation