AUST CTS CLM. 88

FILED

APR 06 2001

TIMOTHY R. WALBRIDGE, CLERK
U.S. BANKRUPTCY COURT
NORTHERN DISTRICT OF OKLAHOMA

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

IN RE:	
STEPHEN H. ALMOND and LORI A. ALMOND,	**Case No. 00-04313-M** **Chapter 7**
Debtors.	

MEMORANDUM OPINION

THIS MATTER comes before the Court pursuant to the Motion for Relief From the Automatic Stay and for Abandonment (the "Motion") filed by Local Oklahoma Bank of Grove, Oklahoma ("Bank") and the Partial Objection to the Motion filed by Karen Carden Walsh, Trustee ("Trustee" or "Ms. Walsh"). An evidentiary hearing was held on the Motion on March 20, 2001. Bank appeared by and through its attorney, David E. Jones. The Trustee appeared *pro se*. At the hearing, the Court received evidence and heard argument from the parties. The following findings of fact and conclusions of law are made pursuant to Bankruptcy Rule 7052 and Federal Rule of Civil Procedure 52.

Jurisdiction

The Court has jurisdiction over this contested matter pursuant to 28 U.S.C.A. § 1334(b),[1] and venue is proper pursuant to 28 U.S.C.A. § 1409. Reference to the Court of this matter is proper pursuant to 28 U.S.C.A. § 157(a), and it is a core proceeding as contemplated by 28 U.S.C.A. § 157(b)(2)(G).

---

[1] Unless otherwise noted, all statutory references are to sections of the United States Bankruptcy Code, 11 U.S.C.A. § 101 *et. seq.* (West 2001).

37

Findings of Fact

The facts of this matter are largely undisputed. At issue are two separate loan transactions between the Debtors, Stephen H. Almond and Lori A. Almond ("Debtors" or the "Almonds") and Bank.[2] On January 22, 1999, Debtors executed and delivered to Bank a promissory note and security agreement (the "First Note") in the original principal amount of Eleven Thousand Four Hundred Ninety-Nine Dollars and fifty-nine cents ($11,499.59). Under the terms of the First Note, Debtors pledged as collateral to the Bank a 1994 Lincoln Mark VIII motor vehicle (the "Vehicle"). The Trustee does not dispute the Bank's right to relief from the automatic stay with respect to the Vehicle.

It is the other loan transaction between the Almonds and the Bank which is in dispute. On or about March 20, 2000, the Almonds executed and delivered to the Bank a promissory note and security agreement (the "Second Note"). The Second Note identifies the borrower as "Grove Music," and is signed by the Almonds in their individual capacities. According to Mr. Almond, Grove Music is a trade name under which he operated a sole proprietorship. The proceeds of the Second Note were used to purchase all of the assets of a music store located in Grove (the "Business Assets"). After the purchase, the Almonds operated the music store.

Under the terms of the Second Note, Mr. and Mrs. Almond pledged as collateral to the Bank all of their inventory, equipment, accounts, instruments, documents, chattel paper and other rights to payment, and general intangibles. On or about May 10, 2000, the Bank caused to be filed with the Office of the Oklahoma County Clerk a financing statement relating to this promissory note. The

---

[2] The Motion also makes reference to a third loan transaction between the Bank and the Debtors. Said loan was made on an unsecured basis, and is thus irrelevant to the dispute before the Court.

financing statement listed "Grove Music" as the debtors. The names of the Almonds do not appear on this financing statement.[3]

Later that year, Mr. and Mrs. Almond decided to form a corporation, Almond's Grand Lake Music Co., Inc. (the "Corporation"). A certificate of incorporation was recorded in the Office of the Secretary of State of Oklahoma on May 30, 2000. On October 10, 2000, the Corporation, the Almonds and the Bank entered into an assumption agreement. Under the terms of the assumption agreement, the Corporation became jointly and severally liable with the Almonds on the promissory note. In addition, the assumption agreement stated that

> Purchaser [the Corporation] has contracted for and/or will purchase the said Business Assets, subject to Lender's [Bank's] Security Interest and Present Owner/Joint Debtors [the Almonds] and purchaser have requested lender to waive its option to declare said indebtedness immediately due and payable, and to agree to the transfer of said Business Assets, from the Present Owner thereof to said Purchaser.

See Movant's Exhibit 3. On November 13, 2000, the Bank caused to be filed in the Office of the Oklahoma County Clerk a financing statement listing the Corporation as the debtor and listing as collateral all of the Corporation's inventory, equipment, accounts, instruments, documents, chattel paper and other rights to payment, and general intangibles.

Although Mr. Almond testified that he transferred the Business Assets to the Corporation, the transfer was never documented with any bill of sale or other form of written confirmation. The only documentary evidence of any transfer is found in the financial statements of the Debtors and the Corporation which indicate that as of August 31, 2000, the Corporation owned equipment,

---

[3] The copy of this financing statement which was received into evidence does not show the signatures of the borrowers on the statement.

inventory and accounts receivable. None of these items are described with any particularity in the financial statements.

Debtors filed their petition for relief under Chapter 13 of the United States Bankruptcy Code on November 10, 2000. Although the Debtors listed their ownership of the stock in the Corporation in their bankruptcy schedules, they did not list any of the Business Assets. Debtors' schedules include the Bank as a creditor. On February 7, 2001, Bank filed the Motion, seeking relief from the automatic stay so that it could enforce its security interests in all of its collateral, including the Business Assets. The parties agree that the value of the Business Assets is less than the amount owed to the Bank.

To the extent the "Conclusions of Law" contain any items which should more appropriately be considered "Findings of Fact," such items are incorporated herein by this reference.

Burden of Proof

"The burden of proof on a motion for relief from stay under section 362(d) is a shifting one." 3 Lawrence P. King, Collier on Bankruptcy ¶ 362.10 (15th ed. rev. 2001). Section 362 holds in relevant part:

> . . .
> (g) In any hearing under subsection (d) or (e) of this section concerning relief from the stay of any act under subsection (a) of this section–
>
> (1) the party requesting such relief has the burden of proof on the issue of the debtor's equity in property; and
>
> (2) the party opposing such relief has the burden of proof on all other issues.
> . . .

§ 362(g). Courts have held that

> [s]ection 362(d)(1) requires an initial showing of cause by the movant, while section

> 362(g) places the burden of proof on the debtor for all issues other than "the debtor's equity in property." . . . If the movant fails to make an initial showing of cause, however, the court should deny relief without requiring any showing from the debtor that it is entitled to continued protection.

In re Sonnax Ind., Inc., 907 F.2d 1280, 1285 (2nd Cir. 1990)(citations omitted); *see also In re Elmira Litho, Inc.*, 174 B.R. 892, 900 (Bankr. S.D.N.Y. 1994).

Conclusions of Law

The threshold issue before the Court is whether the Debtors actually transferred the Business Assets to the Corporation in the summer of 2000. If so, the Business Assets are not property of the bankruptcy estate, and the Motion should be granted.[4] Although there appears to be a paucity of law on the issue, there is authority for the proposition that whether a transfer of personal property has occurred is essentially a question of fact. *See Grange Mutual Casualty Co. v. Smith*, 609 N.E. 2d 585, 589-590 (Ohio App. 1992). If the Business Assets were not transferred by the Debtors to the Corporation, the Court must also consider whether the Bank holds a perfected lien upon the Business Assets under the terms of the Second Note and the related financing statement.

Transfer of the Business Assets

The Bank concedes that at the time of the execution of the Second Note, Debtors were the owners of the Business Assets. Under § 362(g), Bank carries the burden of proof on the issue of whether the Debtors have any interest (i.e. equity) in the Business Assets. Bank contends that the Business Assets were transferred to the Corporation sometime in the fall of 2000, relying upon the existence of the Assumption Agreement, the financial records of the Corporation and the testimony

[4] Indeed, it is arguable that if the Business Assets are not property of the bankruptcy estate, relief from the automatic stay is unnecessary. The Bank noted this anomaly, and informed the Court that it had filed the Motion out of an abundance of caution.

of Mr. Almond and an officer of the Bank. After considering these three pieces of evidence in their entirety, the Court is unable to conclude that the Bank has established that the Business Assets were transferred to the Corporation.

The Bank and the Debtors readily acknowledge that there is no direct documentation (such as a bill of sale) to support the testimony of Mr. Almond and the Bank officer regarding the transfer of the Business Assets to the Corporation. The Assumption Agreement contains no language which effectuates a transfer of the Business Assets to the Corporation; instead, the Assumption Agreement contains language to the effect that a transfer of the Business Assets to the Corporation is contemplated at some future time.[5] The financial statements of the Corporation which were received into evidence contain somewhat inconsistent information regarding the ownership of the Business Assets. Those records do not reflect ownership of the Business Assets by the Corporation until August 31, 2000, some three months after the Corporation was formed. Moreover, the sole source of the information contained in those financial statements was Mr. Almond. While it may be possible that Debtors intended to transfer the Business Assets to the Corporation, there is no tangible evidence that they actually did so. When all of the evidence is considered, all that is really before the Court is the testimony of Mr. Almond that he intended to and did in fact transfer, without any documentation, all of his and his wife's interests in the Business Assets to the Corporation.[6] The

---

[5] Given the lack of documentation, the Bank appears to have been indifferent to the transfer of the Business Assets, perhaps in part because of a belief that the Bank held a perfected lien upon the Business Assets regardless of whether they were owned by Debtors or the Corporation.

[6] The Court recognizes that Mr. Hampton, the accountant for Debtors and the Corporation, and Mr. Boyd, an officer of the Bank, each testified that the Business Assets had been transferred to the Corporation. However, the sole basis for each of their testimony was that Mr. Almond informed them of the transfer. Neither of these witnesses held any independent

Court is unpersuaded by this evidence. The Court concludes, for purposes of the Motion, that the Business Assets were never transferred to the Corporation, and remained property of the Debtors at the time of the filing of their bankruptcy case.

Even if a transfer of the Business Assets did take place, the Court would be reluctant to grant relief from the automatic stay and order abandonment of the Business Assets based upon the record before it. There is no evidence that the Business Assets are at risk. There is no evidence that they are declining in value; indeed, there is no evidence before the Court as to the value of the Business Assets, other than the stipulation of the parties that their value is less than the amount owed to the Bank. If a transfer of the Business Assets did take place, such a transfer occurred shortly before the filing of this bankruptcy case. Were the Court to grant the Motion and order the Trustee to abandon the property, such a ruling may well preclude any attempt by the trustee to assert her avoidance powers under § 544 of the Bankruptcy Code. The Court sees no reason to impede the Trustee in the performance of her duties.

Perfection of the Bank's Lien Upon the Business Assets

The Court must next determine whether the Bank has a properly perfected lien upon the Business Assets. For purposes of its decision today, the Court assumes (without deciding) that Bank was granted a security interest in the Business Assets under the terms of the Second Note. The issue before the Court is whether the financing statement filed by the Bank relating to the Second Note, which lists "Grove Music" as the Debtor, is sufficient to perfect that lien. The Trustee argues that the failure to list the names of Mr. and Mrs. Almond on the financing statement is fatal to the Bank's

---

knowledge of such a transfer. As a result, their testimony regarding the transfer of the Business Assets is of little assistance to the Court.

claim of perfection. In response, Bank argues that the use of the term "Grove Music" in place of the name of the Debtors is not so misleading as to defeat Bank's claim of perfection.

The issue of perfection of a lien upon personal property is one of state law. Under § 9-402 of the Oklahoma Uniform Commercial Code,

> A financing statement is sufficient if it gives the names of the debtor and the secured party, is signed by the debtor, gives an address of the secured party from which information concerning the security interest may be obtained, gives a mailing address of the debtor and contains a statement indicating the types, or describing the items, of collateral.

Okla. Stat. Ann. tit. 12A, § 9-402(1) (West 2000). Furthermore, "[a] financing statement sufficiently shows the name of the debtor if it gives the individual, partnership or corporate name of the debtor, whether or not it adds other trade names or the names of partners." Okla. Stat. Ann. tit. 12A, § 9-402(7) (West 2000). The statute also provides that "[a] financing statement substantially complying with the requirements of this section is effective even though it contains minor errors which are not seriously misleading." Okla. Stat. Ann. tit. 12A, § 9-402(8) (West 2000).

This Court has been able to locate two Oklahoma decisions dealing with the use of a trade name upon a financing statement. In *McMullin v. First National Bank & Trust Co. of Ponca City (In re Fowler)*, 407 F.Supp. 799 (W.D. Okla. 1975) (hereafter "*Fowler*"), the bank, in exchange for the loan of money, obtained a security agreement and financing statement from Jerry A. Fowler. The financing statement listed "Kaw Lake Cement [a trade name], Jerry A. Fowler and J.A. Fowler" as the debtors. The financing statement, though filed with the proper state official, was indexed only under the trade name "Kaw Lake Cement," and not under Fowler's name individually.

Fowler later filed for bankruptcy relief. The trustee in bankruptcy sought to avoid the security interest held by the bank, arguing that the inclusion of the trade name in the financing

statement was sufficiently misleading, relying in part upon the erroneous indexing of the financing statement by the state official. The bankruptcy court rejected the position taken by the trustee, and held for the bank. In affirming the decision of the bankruptcy court, the district court, after a thorough review of the operative provisions of the Oklahoma Uniform Commercial Code as well as case law from other jurisdictions, noted that

> . . . the general rule can be formulated that a financing statement, in order to perfect a security interest, must, in the case of an individual, or individuals, doing business under a trade name show the name of the individual legally responsible for the debt unless the trade name and the individual debtor's name are so similar that a prospective creditor, upon seeing the trade name in the records, would be alerted that there might be a prior security interest in the involved collateral.

Fowler, 407 F.Supp at 803 (emphasis added). One of the key facts in *Fowler* was that the financing statement included the legal name of the debtor in addition to the trade name.

Almost twenty years later, this same principle was adopted in *Citizens National Bank & Trust Co. v. Star Automotive Warehouse, Inc. (In re Thriftway Auto Supply, Inc.)*, 159 B.R. 948 (W.D. Okla. 1993), *aff'd* 39 F.3d 1193 (10th Cir. 1994) (hereafter "*Thriftway*"). In *Thriftway*, the borrower/debtor was a corporation with the legal name of "Thriftway Auto Stores, Inc." ("TASI"). TASI did business under the trade name "Thriftway Auto Stores." In 1989, TASI entered into a series of transactions with Star Automotive Warehouse, Inc. ("Star") in which Star supplied automobile parts to TASI on credit. TASI executed and delivered to Star a security agreement and financing statement granting Star a lien upon all such parts supplied by Star. The financing statement, which was properly filed, listed the name of the debtor as "Thriftway Auto Stores," the trade name of TASI. In 1993, TASI entered into additional financing arrangements with Citizens National Bank ("Bank"). Bank obtained a security agreement and financing statement from TASI

upon the collateral claimed by Star. In the case of the Bank, the financing statement listed the correct corporate name of TASI as the debtor.

TASI later filed a petition for relief under Chapter 7 of the Bankruptcy Code. A dispute arose between Star and the Bank regarding their relative lien priorities. Bank claimed that the lien held by Star was unperfected because of the use of the trade name of TASI, rather than its legal name. Star responded by arguing that the trade name (Thriftway Auto Stores) and the legal name (Thriftway Auto Stores, Inc.) were so similar that the use of the trade name was not seriously misleading. The bankruptcy court found in favor of Star, and Bank appealed. As it affirmed the decision of the bankruptcy court, the district court noted that

> . . . the UCC and the Oklahoma statute strongly favor the simplicity and clarity of using a debtor's legal name on a financing statement to be filed with a county clerk's office; however, in certain circumstances, the use of a debtor's trade name is sufficient if a subsequent creditor could reasonably find the listing, either because the particular indexing system provides an inquirer with flexibility or the trade name is very close to the legal name of the debtor.

Thriftway, 159 B.R. at 953. Under this analysis, use of a trade name in a financing statement, without more, is insufficient to perfect a lien, unless the trade name and the legal name of the debtor(s) are so similar as to allow a party searching under one name to discover the other. In *Thriftway*, the court concluded that the trade name and the legal name of TASI were so similar that use of the trade name by Star was not seriously misleading.

In the present case, the trade name "Grove Music" bears no resemblance to the names of Stephen and Lori Almond. The Court has before it no evidence which would establish that someone undertaking a lien search under the names of Stephen and/or Lori Almond would discover a financing statement listing "Grove Music"as the debtor. The Court concludes that the use of the

trade name "Grove Music" in place of the actual names of the Debtors is seriously misleading as that term is defined under the Oklahoma Uniform Commercial Code, and that, as a result, the lien held by the Bank on the Business Assets is not perfected. To the extent Bank seeks relief from the automatic stay with respect to the Business Assets, the Motion is denied.[7]

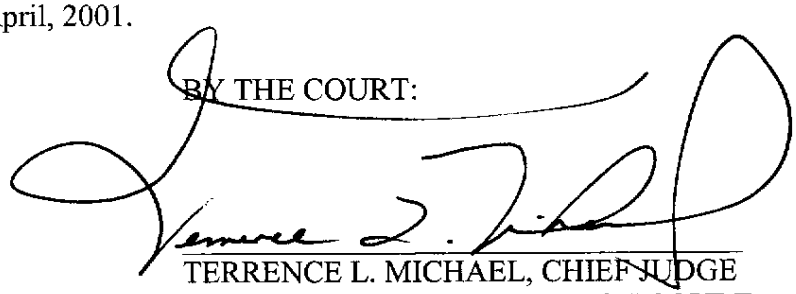
Conclusion

The Motion for Relief From the Automatic Stay and for Abandonment filed by Local Oklahoma Bank of Grove, Oklahoma is granted in part and denied in part. Local Oklahoma Bank of Grove, Oklahoma, is granted relief from the automatic stay as to the 1994 Lincoln Mark VIII Automobile, Serial Number 1LNLM91V6RY762503. The Trustee is further directed to abandon any and all interest in said vehicle. In all other respects, the Motion for Relief From the Automatic Stay and for Abandonment filed by Local Oklahoma Bank of Grove, Oklahoma is denied.

A separate judgment in accordance with this Memorandum Opinion is entered concurrently herewith.

Dated this 6th day of April, 2001.

BY THE COURT:



TERRENCE L. MICHAEL, CHIEF JUDGE
UNITED STATES BANKRUPTCY COURT

[7] The Court also notes that the copy of the financing statement offered into evidence did not reflect that it had been signed by the Debtors, as required under § 9-402(1) of the Oklahoma Uniform Commercial Code. This issue was not raised by the Trustee, and thus was not relied upon by the Court in reaching its decision.

cc: Karen Carden Walsh
David E. Jones
J. Scott McWilliams

2417.3