In the United States Bankruptcy Court

for the Northern District of Iowa

EDWARD DEAN HOPKEY and
MARILYN B. HOPKEY
Debtor(s).

Bankruptcy No. X87-02554M

Chapter 7

FINDINGS OF FACT CONCLUSIONS OF LAW AND ORDER

The matter before the court is an application to abandon property filed by the Federal Deposit Insurance Corp. as receiver of Latimer Bank & Trust. The trustee resisted the application to abandon property. Motions for summary judgment on this application were filed by both the trustee and the FDIC.

The parties have both filed briefs and have agreed to waive oral argument.

The court now issues this ruling which shall constitute findings of fact and conclusions of law pursuant to Bankr. R. 7052.

This is a core proceeding under 28 U.S.C. § 157(b)(2)(A).

FINDINGS OF FACT

The parties have stipulated to the following facts which this court now adopts as its findings:

1. On January 15, 1987, the Superintendent of Banking for the State of Iowa declared the Latimer Bank & Trust f/d/b/a Latimer State Bank insolvent and closed the bank and tender the appointment as Receiver of the Bank to the FDIC. The FDIC accepted appointment as Receiver and transferred to the FDIC in its Corporate capacity all promissory notes, mortgages, security agreements and guarantys previously owned by the Latimer Bank & Trust.
2. Edward Hopkey executed and delivered to the Latimer Bank & Trust three promissory notes dated March 10, 1984, June 22, 1984 and January 30, 1986...
3. Marilyn Hopkey and Edward Hopkey executed a document labeled "promissory note and security agreement" dated June 22, 1984 . . . .
4. In conjunction with the note dated June 22, 1984, Edward Hopkey executed a loan agreement for a FHA loan. Marilyn Hopkey did not execute the agreement.
5. Marilyn Hopkey executed and delivered to the Latimer Bank & Trust a guaranty dated April 5, 1976. . . .
6. On December 21, 1987, Edward D. Hopkey and Marilyn B. Hopkey filed a Chapter 7 bankruptcy with the United States Bankruptcy Court for the Northern District of Iowa, Case No. X87-02554M.
7. Edward D. Hopkey and Marilyn B. Hopkey were indebted to the FDIC by virtue of the promissory notes given to the Latimer Bank & Trust in the total amount of $514,740.06 on the date the Hopkeys filed their Chapter 7 bankruptcy which is evidenced by a proof of claim filed by the FDIC on February 19, 1983.

8. Edward Hopkey executed and delivered a security interest in farm machinery and equipment to the Latimer Bank & Trust on February 2, 1971, December 5, 1975, May 11, 1976, December 21, 1976, December 16, 1977, December 22, 1978, December 17, 1979, December 22, 1980, January 6, 1982, January 3, 1983, and January 4, 1984, ... The foregoing security agreements are in addition to the security agreements given to the Latimer Bank & Trust by Edward Hopkey by virtue of the security agreements contained on the promissory notes from previously identified as Exhibits, "A", "B" and "C".
9. Marilyn Hopkey did not execute any of the security agreements or promissory notes described in paragraph 8. Marilyn Hopkey only executed a document labeled "promissory note and security agreement" with her husband, Edward Hopkey, dated June 22, 1984, and previously identified as Exhibit "D".
10. The security agreements given by Edward Hopkey were perfected with the Iowa Secretary of State by virtue of financing statements filed by the Latimer Bank on December 23, 1976, which was continued on October 28, 1981, and on October 20, 1986 . . . .
11. The financing statement filed by the Latimer Bank on December 23, 1976, was amended on July 17, 1985, to add Marilyn Hopkey . . . .
12. Marilyn Hopkey, on the date of the Chapter 7 bankruptcy, was a joint owner with her husband of all farm machinery and equipment that was pledged as collateral by her husband, Edward Hopkey, to the Latimer Bank & Trust.
13. Marilyn Hopkey knew and acquiesced to her husband, Edward Hopkey, granting a security interest in all of the farm machinery and equipment to the Latimer Bank & Trust.
14. The bankruptcy Trustee now has possession $18,000.00 which represents one-half of the proceeds the Trustee received from the sale of Marilyn and Edward Hopkey's nonexempt farm machinery and equipment. The Trustee has turned over to the FDIC the other one-half of the proceeds that represented Edward Hopkey's interest in the nonexempt farm machinery and equipment that was sold.

I.

Motions for summary judgment on the FDIC's application to abandon property have been filed by both the debtors and the FDIC.

Summary judgment is only proper when no genuine issue of material fact exists, and the movant is entitled to judgment as a matter of law. Sommers v. Budget Marketing, Inc., 667 F.2d 748, 750 (8th Cir. 1982). The court must consider the facts in the light most favorable to the non-movant, and the non-movant is entitled to all reasonable inferences which may be derived from the underlying facts as shown by the pleadings, depositions and affidavits presented. Sommers, 667 F.2d at 749-50. Summary judgment will be denied if the moving party fails to show the absence of a genuine issue of material fact. Foster v. JohnsManville Sales Corp., 787 F.2d 390, 393 (8th Cir. 1986).

II.

Debtor Marilyn Hopkey was a joint owner of all farm machinery and equipment which was pledged as collateral by Edward Hopkey to the Latimer Bank & Trust. The issues before the court are whether Marilyn granted a valid security interest in her one-half joint interest in the farm machinery and equipment and if so, does that interest have priority over the trustee's interest under 11 U.S.C. 5 544 (a).

The trustee argues that the FDIC, successor-in-interest to the Latimer Bank & Trust, does not have a duly perfected security interest in the non-exempt machinery and equipment to the extent of the

ownership interest of Marilyn. The trustee contends that Marilyn has never signed a valid security agreement granting a security interest in the machinery and equipment.

Edward Hopkey executed and delivered to the Latimer Bank promissory notes which contained security agreements dated March 10, 1984, June 22, 1984 and June 30, 1986. These promissory notes were never signed by Marilyn.

Additionally, Edward executed and delivered security agreements to the Latimer Bank & Trust which granted a security interest in, among other things, all farm equipment. These security agreements were dated February 2, 1971, December 5, 1975, May 11, 1976, December 21, 1976, December 16, 1977, December 22, 1978, December 17, 1979, December 22, 1980, January 6, 1982, January 3, 1983 and January 4, 1984. These security agreements were never signed by Marilyn.

The FDIC argues that the promissory note and security agreement executed by both debtors on June 22, 1984 is a valid security agreement which granted the bank a security interest in all farm machinery and equipment owned by both debtors. The document included a number of boxes which could be checked with reference to a security agreement. The language following the checked box stated: "If checked, this Note is secured by the Security Agreement hereafter and Borrower hereby grants to the Lender a Security Interest under the Uniform Commercial Code in the following described Collateral." The box with the following language was also checked: "In addition to any property generally described about the following Collateral." The following language was typed in after the above-stated language: "see open-ended real estate mortgage dated June 22, 1984 for $200,000.00."

The trustee argues that this security agreement is not adequate to grant a security interest in farm machinery and equipment since the document makes no mention of these items. The document contains a list of types of property with boxes preceding them, which can be checked to provide for a security interest in specific types of property. There is a box for equipment; however, the box is not checked.

The FDIC contends that if the security agreement is read in its entirety, it is clear that the debtors granted the bank a security interest in all inventory, equipment, farm products, accounts and other rights to payment and general intangibles. The FDIC also argues that the June 22, 1984 promissory note and security agreement read in conjunction with the FMHA loan agreement (Exhibit B) clearly shows that the bank obtained a security interest in all of the jointly owned farm machinery and equipment. This loan agreement was not signed by Marilyn Hopkey.

Additionally, FDIC states that there was an amendment to an original financing statement (Exhibit U) filed with the Iowa Secretary of State on July 17, 1985 which included the signature of Marilyn Hopkey. The FDIC contends that this provides additional evidence that Marilyn Hopkey granted the bank a security interest in her share of the farm machinery and equipment.

The stipulated facts and exhibits indicate that the only documents signed by Marilyn Hopkey include a promissory note and security agreement dated June 22, 1984; a guarantee dated April 5, 1976; an amended financing statement filed with the Iowa Secretary of State on July 17, 1985 and a continuation of financing statement filed with the Iowa Secretary of State on October 20, 1986.

FDIC will only have an enforceable security interest if the provisions of Iowa Code § 554.9203 are met. Section 554.9203 provides that:

". . . [A] security interest is not enforceable against the debtor or third-parties with respect to the collateral and does not attach unless

a. the collateral is in the possession of the secured party pursuant to agreement or the debtor has signed a security agreement which contains a description of the collateral and in addition, when the security interest covers crops growing or to be grown or timber to be cut, a description of the land concerned; and
b. value has been given; and
c. the debtor has rights in the collateral."

The promissory note and security agreement dated June 22, 1984 which was signed by Marilyn Hopkey does not provide for a security interest in farm machinery and equipment. The document makes no mention of granting a security interest in farm equipment. The form used by the Latimer Bank & Trust contains a box which can be checked to grant a security interest in equipment. This box was not checked.

FDIC also contends that the loan agreement (Exhibit B) and amended financing statement (Exhibit U) provide evidence that Marilyn Hopkey intended to grant the bank a security interest in equipment. The loan agreement does not provide for the granting of a security interest. Additionally, this agreement was not signed by Marilyn Hopkey.

III.

The June 22, 1984 promissory note and security agreement did not grant the bank a security interest in Marilyn Hopkey's interest in the farm machinery and equipment. The next issue that must be addressed by this court is whether FDIC has an enforceable security interest in Marilyn's share of the machinery and equipment, based on the security agreements signed by Edward on February 2, 1971, December 5, 1975, May 11, 1976, December 21, 1976, December 16, 1977, December 22, 1978, December 17, 1979, December 22, 1980, January 6, 1982, January 3, 1983, and January 4, 1984 (Exhibits G through Q). These security agreements, which were signed only by Edward, granted a security interest in among other things, all of the debtors' equipment. FDIC argues that Edward Hopkey had sufficient rights in all the farm machinery and equipment to pledge them as security and therefore Marilyn's signature was not necessary to create a valid security interest.

A security interest is not enforceable against the debtor or third parties and does not attach unless the following three requirements are met:

1. the collateral is in possession of the secured party or the debtor has signed a security agreement;
2. value has been given; and
3. the debtor has rights in the collateral.

Iowa Code § 554.9203(l).

There is no dispute that value was given. The debtor must have rights in the collateral in order for a security interest to be enforceable against a debtor or third parties. Iowa Code § 554.9203(l)(c). "The secured party only gets rights in the goods to the extent of the debtor's rights in them." State Bank of Young America v. Vidmar Iron, 292 N.W.2d 244, 250 (Minn. 1980). Section 554.9203(l)(c) does not specifically state that the debtor has to be the sole owner of the collateral in order to grant a security interest. A number of courts have concluded that "rights in the collateral" are not equated with

ownership. See In re Atchison, 832 F.2d 1236, 1239 (llth Cir. 1987); In re Schultz, 63 B.R. 168, 172 (Bankr. D. Neb. 1986); In re Slagle, 78 B.R. 570, 572 (Bankr. D. Neb. 1987); Federal Deposit Insurance Corp. v. Schnipkoweit (in re Schnipkoweit), Adv. No. 88-0009, slip op. at 4 (Bankr. S.D. Iowa, Oct. 6, 1988).

"[T]he Commercial Code recognizes that a debtor who does not own collateral may nonetheless use the collateral for security, thereby obtaining 'rights in the collateral' when authorized to do so by the actual owner of the collateral." Valu-U Const. Company of South Dakota, Inc. v. Contractors, Inc., 213 Neb. 291, 328 N.W.2d 774, 777 (1983). See also K.N.C. Wholesale, Inc. v. NWMCO, Inc., 127 Cal.R. 345, 18 U.C.C. Rep. 1303, 1306 (1976).

The parties have stipulated that Marilyn Hopkey was a joint owner of the farm equipment and machinery. Additionally, the stipulated facts in this case indicate that Marilyn Hopkey knew and acquiesced to her husband granting a security interest in all the farm machinery and equipment to the Latimer Bank & Trust.

The court in In re Slagle, 78 B.R. 570, 572 (Bankr. D. Neb. 1987) relied on U.C.C. § 9-112 in concluding that a debtor may acquire rights in collateral upon authorization of the actual owner. See also Towe Farms, Inc. v. Cent. Iowa Prod. Credit, 528 F.Supp. 500, 505 (S.D. Iowa 1981).

Since Edward Hopkey had his wife's permission to use her interest in the jointly owned farm machinery and equipment as collateral, Edward Hopkey had sufficient rights to create an enforceable security interest in her interest in the property. See Iowa Code § 554.9112.

In addition to requiring a debtor to have "rights in the collateral," the plain language of the U.C.C. indicates that the debtor must sign the security agreement before it will attach. Iowa Code § 554.9203 (l)(a).

However, courts for the State of Nebraska and South Dakota have held that an owner of property does not need to sign the security agreement if another person has sufficient "rights in the collateral" to encumber the owner's property. First National Bank in Pierre v. Feeney, 393 N.W.2d 458 (S.D. 1986); Val-U Construction Co. of South Dakota v. Contractors, Inc., 328 N.W.2d 774 (Nebr. 1983). This is also the position taken by the bankruptcy court in the District of Nebraska. See In re Schulz, 63 B.R. 168, 172.[(1)]

This issue has not been decided by the Iowa Supreme Court. However, the bankruptcy court for the Southern District of Iowa has followed the majority of the courts in concluding that a debtor may acquire rights in the collateral upon the authorization of the actual owner and thereby create an enforceable security interest. Schnipkoweit v. FDIC (In re Schnipkoweit), slip op. 88-0009 (Bankr. S.D. Iowa, Oct. 6, 1988).

This court will follow the decisions of the Nebraska and South Dakota courts in concluding that a debtor who has sufficient rights in the collateral of another person is the only person who needs to sign a security agreement in order to satisfy U.C.C. § 9-203(l)(a). If a debtor has sufficient rights in all of the collateral, the actual owner does not need to sign the security agreement.

Marilyn Hopkey granted her husband permission to use her interest in the jointly owned farm machinery and equipment as collateral. Therefore, Edward Hopkey had sufficient rights in all of the jointly owned farm equipment, and his signature was the only one needed on the security agreement. Edward Hopkey has signed a valid and enforceable security agreement.

IV.

FDIC has a security interest in Marilyn Hopkey's farm equipment and machinery. However, this court must determine whether FDIC's security interest is validly perfected and therefore superior to the right of the trustee.

Pursuant to 11 U.S.C. § 544(a)(1), the trustee has the rights and powers of a hypothetical judicial lien creditor as of the date of the filing of the bankruptcy petition. Norwest Bank, St. Paul v. Bergquist (In re Rolain), 823 F.2d 198, 199 (8th Cir. 1987). The trustee's rights under 11 U.S.C. § 544 are those of a judicial lien creditor under state law. Rolain at 199. In Iowa, an unperfected security interest is subordinate to the rights of a person who becomes a lien creditor before the security interest is perfected. Iowa Code § 544.9301. See In re Hollingsworth, slip op. 82-00328 (Bankr. N.D. Iowa, July 2, 1985).

In order to have a perfected security interest in Mrs. Hopkey's interest in the collateral as to the trustee, her name would have to appear on the financing statement. First National Bank in Pierre, S.D. v. Feeney, 393 N.W.2d 458, 460 (S.D. 1986).

Iowa Code § 554.9402(l) provides in part, "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 security party from which information concerning the security interest can be obtained, gives a mailing address of the debtor and contains a statement indicating the types, or describing the items, of collateral . . ."

The original financing statement (Exhibit R) filed with the Iowa Secretary of State on December 23, 1976 did not meet the formal requisites required by Iowa Code § 554.9301. This original financing statement did not include the name and signature of the debtor, Marilyn Hopkey.

However, the original financing statement was amended on July 17, 1985. The amended financing statement (Exhibit U) added Marilyn Hopkey as a debtor. This statement refers to the original financing statement filed on December 23, 1976. The amended statement includes Marilyn Hopkey's name, address, and signature.

A financing statement may be amended by filing a writing signed by both the debtor and the secured party. Iowa Code 554.9402(4). The amendment (Exhibit U) includes the signatures of the debtors Edward and Marilyn Hopkey and the secured party, Latimer Bank & Trust.

"[T]he validity of a financing statement depends primarily on its ability to give notice of the secured interest to other creditors." Griswold State Bank v. Rieber (In re Rieber), 740 F.2d 10, 11 (8th Cir. 1984). The amended financing statement (Exhibit U), which refers to the original financing statement (Exhibit R), provides sufficient information to notify others that Latimer Bank & Trust had a security interest in Marilyn Hopkey's share of the farm equipment and machinery. See Rieber at 11. Exhibit R states:

> "This financing statement covers the following types (or items) of property: All equipment and fixtures, including, but not limited to, all machinery, tools, vehicles, sheds and storage facilities, used or acquired for use in farming operations.

The original financing statement and amended financing statement were properly filed in the office of the Iowa Secretary of State. See Iowa Code § 554.9401. A continuance of the financing statement (Exhibit T) was timely filed on October 20, 1986. Therefore, the bank possessed a validly perfected

security interest in all of Edward and Marilyn Hopkey's farm machinery and equipment since the amendment was filed on July 17, 1985.

The trustee, as a hypothetical lien creditor, does not have priority over a security interest which is already validly perfected. Iowa Code § 554.9301. Since the FDIC has a validly perfected security interest in all of the debtors' farm machinery and equipment, the FDIC's motion for summary judgment should be granted.

ORDER

IT IS ORDERED that the FDIC's motion for summary judgment is granted.

IT IS FURTHER ORDERED that the trustee abandon non-exempt machinery and equipment proceeds in his possession which are subject to a valid and perfected security interest held by FDIC.

IT IS FURTHER ORDERED that the trustee's motion for summary judgment is denied.

SO ORDERED ON THIS 4th DAY OF JANUARY, 1989.

William L. Edmonds
Chief Bankruptcy Judge

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1. One court has held that the owner of the property must have signed a security agreement or at least a document which constitutes a separate acknowledgment of the existence of a security interest, even if another party had sufficient "rights in the collateral" to encumber the owner's property. Baystate Drywall, Inc. v. Chicopee Savings Bank, 32 U.C.C. Rep. 1315, 1319-20 (Mass. 1982). The amended financing statement of July 17, 1985 includes Marilyn Hopkey's name, address, and signature. Under this theory, the amended financing statement would constitute a separate acknowledgment of the existence of a security interest in all of the jointly owned farm machinery and equipment.