

In the United States Bankruptcy Court

for the Northern District of Iowa

Western Division

DOUGLAS R. CLAUS and
JERILYN A. CLAUS

Debtor(s).

Bankruptcy No. 92-51357XS

Chapter 7

DONALD H. MOLSTAD Trustee

Plaintiff(s)

Adversary No. 92-5178XS

vs.

SIBLEY STATE BANK

Defendant(s)

MEMORANDUM OF DECISION AND ORDER RE: AVOIDANCE COMPLAINT

The matter before the court is the trustee's complaint against Sibley State Bank (BANK) to avoid a transfer of debtors' property. The parties agreed to submit the matter on stipulated facts; the stipulation was filed with the court on February 8, 1993. Each party filed a brief, and the matter is now fully submitted.

Donald H. Molstad, the trustee, seeks to avoid the bank's setoff of funds which had been deposited by debtors in their account at the bank. Nearly all of the funds in the account at the time of setoff represented a final payment to the debtors by the buyer of real estate which had been sold by debtors under an installment contract. The trustee contends that the setoff may be avoided as a preference under 11 U.S.C. § 547 or the setoff may be recovered from the Bank pursuant to 11 U.S.C. § 553. Bank argues that it was fully secured in the real estate contract payment, and therefore it did not receive more by virtue of the setoff than it would have received had no setoff taken place.

The court accepts the stipulation of the parties and finds as facts the contents thereof. The court's findings are an edited version of the parties' stipulation. The exhibits attached to the stipulation are admitted into evidence.

Findings of Fact

* * *

2. All signatures appearing on any Exhibit are genuine.
3. Douglas R. Claus and Jerilyn A. Claus are debtors of the Bank.
4. Douglas R. Claus and Jerilyn A. Claus are signators and debtors under two promissory notes held by the Bank, described as follows:
 - a. Note no. 5017736-5546, dated June 3, 1991, in the original amount of \$29,450, present balance \$1,446.18, plus interest, after credit for the offset described more specifically below. (Exhibit A)
 - b. Note no. 5017736-5545, dated June 3, 1991, in the original amount of \$64,800, present balance

\$64,800.00, plus interest. (Exhibit B)

5. The two promissory notes (Exhibits A and B) are secured by a mortgage on an 18 acre tract of ground which is the debtors' homestead.

6. The two promissory notes (Exhibit A and B) are also secured by a "blanket" security agreement and financing statement (Exhibits C and D).

7. The financing statement (Exhibit D) is properly filed and the Bank is perfected in collateral described in it.

8. In addition to the two promissory notes (Exhibits A and B) the debtors had signed a third note with the Bank, #5017736-3001 in the amount of \$75,000. (Exhibit E).

9. The \$75,000 note (Exhibit E) was secured by a mortgage on 50 acres of land owned by the debtors ("the 50 acres"), and was co-signed by Roger Claus, Douglas' father.

10. In early March of 1992, the debtors entered into a real estate contract to sell the 50 acres to Warren O. Consoer for \$57,500. (Exhibit F) The contract reflects a signature date of March 4, 1992, although the down payment was received earlier.

11. On March 2, 1992, Consoer made a down payment to the debtors of \$28,750.

12. On March 2, 1992, debtors and Roger Claus, using the Consoer down payment and additional funds from Roger, paid off the \$75,000 note (Exhibit E).

13. On March 3, 1992, the bank signed releases of its mortgages against the 50 acres. (Exhibits G and H) These were recorded in due course.

14. The real estate contract with Consoer was not recorded in the office of the County Recorder.

15. On or about April 21, 1992, Consoer made final payment on the contract in the amount of \$28,750.

16. On April 23, 1992, the debtors deposited the Consoer funds into their checking account no. 6-1482-3 at Sibley State Bank.

17. On April 23, 1992, the Bank offset funds in the debtors' account in the sum of \$28,914.12.

* * *

19. The bank applied the offset funds to the \$29,450 note (Exhibit A) leaving a balance of \$1,446.18.

20. The debtors filed their Chapter 7 petition with this Court on July 20, 1992, within ninety days of the date of the offset.

21. Ninety days prior to the filing of the petition, the debtors' checking account balance in the Sibley State Bank was \$170.27.

22. The debtors were insolvent on each of the ninety days preceding the petition.

23. Exhibit J is an accurate record of loan payments made to the Bank by the debtors, including the offset, regarding notes described in these findings.

24. The Trustee takes the position that the bank improved its position by the offset of the Consoer funds deposited into the checking account, and that the funds must be returned under Sections 547 and 553 of the Bankruptcy Code.

25. The Bank concedes that the offset improved its position to the extent of \$164.12 -- this being the amount of additional funds over and above the Consoer payment which were offset from the checking account (\$28,914.12 - \$28,750). The bank contends, however, that it was secured in the Consoer contract proceeds and did not improve its position by offsetting them.

The Issue

The parties have by stipulation narrowed the issue presented to the court.

"The sole issue for determination by the Court, is whether the Bank's security instruments created a valid security interest in the balance of the real estate contract with Consoer. . . . If the Bank did not have a valid security interest in the proceeds of the Consoer contract, the funds should be returned to the estate. . . . If the Bank did have a valid security interest in the proceeds of the Consoer contract, the Bank should return \$164.12 to the Trustee." Stipulation, Docket no. 10, page 5.

Discussion

Despite the fact that Bank devotes a substantial part of its brief arguing for the proposition that one perfects a security interest in a vendor's interest in a real estate contract by filing a financing statement, the trustee does not appear to dispute the proposition. Indeed, there is support for such a position. Mercantile Bank, N. A. v. Brown (In re Holiday Intervals, Inc.), 931 F.2d 500, 502 (8th Cir. 1991); Nazar v. Southern (In re Southern), 32 B.R. 761, 764 (Bankr. D. Kan. 1983); 2 J. White & R. Summers, Uniform Commercial Code § 23-7 at 274 (3rd ed. 1988); Briley v. Madrid Improvement Co., 255 Iowa 388, 122 N.W.2d 824, 827 (1963) (a vendor's interest in a real estate contract is personalty).

In his brief, the trustee does not take issue with this proposition, and he implicitly concedes it. Instead, the trustee contends that the description of the purported collateral as a "general intangible" was insufficient under the Uniform Commercial Code to perfect the Bank's interest as against the trustee. The trustee disputes perfection in the property in question notwithstanding paragraph 7 of the stipulation.

The trustee called the Bank's "general intangible" description "vague" and "supergeneric", not enabling "even the most astute putative creditor to identify the money in issue as having been subject to a security interest by the defendant." Trustee's brief, page 4. The trustee argues that because the description fails to put a potential creditor on notice as to what collateral is claimed, the security agreement is unperfected. The trustee has focused his complaint on the financing statement.

Section 554.9402(1) of the Iowa Code (Iowa's adoption of the Uniform Commercial Code) provides that a financing statement is sufficient if, among other things, it "contains a statement indicating the types, or describing the items, of collateral." Moreover, § 554.9110 of the Iowa Code states that "[f]or the purposes of [Article 9] any description of personal property . . . is sufficient whether or not it is specific if it reasonably identifies what is described."

"The purpose of the financing statement is to give public notice to other creditors that a security interest is claimed in the debtor's collateral." Merchants National Bank v. Halberstadt, 425 N.W.2d 429, 432 (Iowa App. 1988) (citing First State Bank v. Shirley Ag Service, Inc., 417 N.W.2d 448, 451 (Iowa 1987)). "Because the financing statement is designed to warn subsequent creditors rather than to identify the collateral, the collateral need not be specific but may be described by type." Merchant's National Bank, 415 N.W.2d at 432.

"General intangibles" is a defined term in the Uniform Commercial Code. It means "any personal property (including things in action) other than goods, accounts, chattel paper, documents, instruments and money." Iowa Code § 554.9106. The term may be used to sufficiently describe collateral in a financing statement so long as the property at issue fits within its definition. There is no argument in this case that it does not. Bank's financing statement was legally sufficient to perfect its interest in the debtors' interest in the payments from the contract vendee. Pursuant to the stipulation of the parties, resolution of this issue leads to a determination that Bank's setoff of \$28,750.00 from debtors' bank account is not avoidable under 11 U.S.C. § 547 or 553. Bank's setoff of \$164.12 is so avoidable. Accordingly,

ORDER

IT IS ORDERED that Donald H. Molstad, trustee, shall recover from Sibley State Bank the sum of \$164.12. Each party shall bear its own costs. Judgment shall enter accordingly.

SO ORDERED ON THIS 19th DAY OF AUGUST, 1993.

William L. Edmonds
Chief Bankruptcy Judge

I certify that on I mailed a copy of this order and a judgment by U. S. mail to: Donald Molstad, Daniel E. DeKoter, and U. S. Trustee.