

In the United States Bankruptcy Court

for the Northern District of Iowa

KENNETH AND WARREN CONTRACTING
COMPANY, INC.

Bankruptcy No. 96-61400KW

Debtor.

Chapter 11

ORDER RE MOTION TO LIFT STAY AND TO PROHIBIT USE

On January 16, 1997, the above-captioned matter came on for hearing on a Motion to Lift Stay and to Prohibit Use filed by Orix Credit Alliance, Inc. Pursuant to the record made at hearing, the parties submitted briefs and an agreed stipulation of facts. This matter is now ready for resolution on the question of whether a lien exists in favor of Orix. This is a core proceeding pursuant to 28 U.S.C. 157 (b)(2)(G, K).

STATEMENT OF THE CASE

Orix Credit Alliance, Inc. asserts a security interest in a slipform paver which Debtor Kenneth and Warren Contracting, Inc. purchased from Agee Concrete and Construction, Inc. Orix alleges that Agee granted Orix a security interest in the paver which Orix perfected in Indiana. It argues that the perfected security interest survives the sale of the paver to Debtor and its removal to Iowa. Debtor asserts that Orix's interest became unperfected because it failed to reperfect in Iowa. It seeks to avoid the security interest under 11 U.S.C. 544(a).

FINDINGS OF FACT

The Court adopts the parties' Joint Fact Stipulation re Motion to Lift Stay filed January 27, 1997. In brief, the stipulated facts reflect that Orix financed Agee's purchase of the paver in April 1992. The paver is used in road construction. Orix perfected its security interest by filing a financing statement in Indiana where Agee had its place of business. On June 28, 1993, Agee sold the paver to Debtor without prior consent or knowledge of Orix.

At the time of the purchase by Debtor, the paver was in Agee's possession in Indiana. Debtor moved the paver to its place of business in Waterloo, Iowa a few days later. Orix first learned of the sale and the relocation of the equipment in July 1994. Orix has not filed a financing statement with the Secretary of State of Iowa where Debtor and the equipment are located. Debtor filed its Chapter 11 petition on June 4, 1996.

CONCLUSIONS OF LAW

The golden rule of Article 9 of the U.C.C. is found in 9-201 and reiterated in 9-306(2). "[A] security agreement is effective according to its terms between the parties, against purchasers of the collateral and against creditors." Iowa Code 554.9201. Security interests continue in collateral notwithstanding sale or other disposition, unless the disposition was authorized by the secured party. Iowa Code 554.9306(2).

Thus, in the inevitable conflicts which arise between two innocent parties, the one a perfected secured creditor who has not authorized its debtor to sell and the other a subsequent buyer from the debtor, the perfected secured creditor is usually the winner.

4 James J. White & Robert S. Summers, Uniform Commercial Code 33-12 (4th ed. 1995).

Perfection of a security interest in ordinary goods is governed by "the law of the jurisdiction where the collateral is when the last event occurs on which is based the assertion that the security interest is perfected or unperfected." Iowa Code 554.9103(1)(b). This "last event" will frequently be the filing of the security interest. U.C.C. 9-103 Official Comment. Perfection of a security interest in mobile goods is governed by the law of the jurisdiction in which the debtor is located. Iowa Code 554.9103(3)(b). Mobile goods are defined as including "road building and construction machinery. . . and the like." Iowa Code 554.9103(3)(a).

If the paver is considered an ordinary good, Orix has a perfected security interest based on its filing in Indiana where the paver was located in 1992. In this situation, the "last event" of Orix's financing of Agee's purchase of the paver was the filing of a financing statement in Indiana.

If the paver is considered a mobile good, Orix perfected by filing in Indiana where Agee is and was located. The parties stipulate that Orix did not consent to Agee selling the paver to Debtor. They also stipulate that Orix perfected its security interest in Indiana. Orix's perfected security interest is senior to Debtor's interest as purchaser of the collateral.

ORDINARY GOODS

Debtor asserts that the paver constitutes an "ordinary good" under sec. 554.9103(1). It argues that under subsection (d) Orix lost its perfected security interest when it failed to file a U.C.C. financing statement in Iowa within four months after the paver was moved to Iowa. Sec. 554.9103(1)(d) states that if ordinary goods are removed from the original jurisdiction where the security interest was perfected, the creditor must reperfect in the new jurisdiction within four months after removal. If the creditor fails to perfect in the new jurisdiction, the security interest is unperfected as against a purchaser after removal. Id.

In order for subsection (d) to apply, the sales transaction must occur after removal of the collateral from the state. In re Julien Co., 141 B.R. 384, 388 (Bankr. W.D. Tenn. 1992). The plain meaning of this provision dictates that a security interest does not become unperfected against a person who purchases the property before it is moved out of state. Alpine Paper Co. v. Lontz, 856 S.W.2d 940, 942 (Mo. Ct. App. 1993)

In Alpine Paper Co., Alpine perfected a security interest in Iowa. Lontz purchased the collateral and resold it to PAI, all in Iowa. PAI moved it to Missouri. Id. at 941. Applying sec. 9-103(1)(d), the court stated that the security interest was still perfected against the purchasers, Lontz and PAI, who purchased before the collateral was moved out of state. Id. at 942. The question is whether the party claiming priority to the perfected security interest is a "purchaser after removal".

The four-month rule in 9-103(1)(d) is not meant to protect a third party involved before removal. Id. at 943. "When the sale itself results in an interstate transfer of collateral, the secured party does not need to refile. Otherwise, any out-of-state purchaser would be able to defeat a valid and perfected security interest." Id.

The loss of perfection arising from sec. 9-103(1)(d) only improves the position of a "purchaser after removal." A third party who purchases collateral in the state where a creditor perfects a security interest, cannot benefit from sec. 9-103(1)(d) for the creditor's failure to perfect in the state to which the third party later moves the collateral. Julien Co., 141 B.R. at 388.

Orix did not consent to the sale of the paver to Debtor. The transaction occurred before removal of the paver to Iowa. Knowledge of Orix's security interest in the paver is imputed to Debtor who knew that the proper place to look for encumbrances on the paver would be in Indiana. See Alpine Paper Co., 856 S.W.2d at 943. As such, Orix's security interest survives the sale of the paver by Agee and remains perfected against Debtor. The fact that Debtor moved the paver to Iowa after purchase is essentially irrelevant.

MOBILE GOOD

Alternatively, Debtor argues that if the paver is considered a "mobile good" under sec. 554.9103(3), subsection (e) also requires perfection within "four months after a change of the debtor's location to another jurisdiction." The parties stipulate that the paver is used in road construction, is normally used by contractors such as Debtor in various job sites and is not covered by any certificate of title. The paver appears to satisfy the definition of a mobile good under the statutory language as well as relevant case law. See In re Minnesota Util. Contracting, Inc., 110 B.R. 414, 423 (D. Minn. 1990) (discussing meaning of "mobile goods").

Debtor characterizes itself as the "debtor" under sec. 554.9103(3)(e), because it is the current owner of the collateral. Under Article 9 definitions, "debtor" may mean the person who owes payment on the secured obligation or the owner of the collateral, depending on the circumstances. Iowa Code 554-9105(d).

Regardless of whether Agee or Debtor is considered the "debtor" in the context of sec. 554-9103(3) (e), neither has changed its location. Subsection (e) specifically refers to "a change of the debtor's location to another jurisdiction" as triggering the requirement that the creditor perfect in the new jurisdiction. The language of this provision does not include the change of "debtor", or owner of the collateral, as triggering this requirement. This Court is unable to find any authority which supports Debtor's position, and Debtor has cited none. Debtor's argument that the change of debtor, from Agee to itself, constitutes a "change of the debtor's location" under sec. 554-9103(3)(e) is unavailing.

AVOIDANCE OF LIEN, 544

Based on the foregoing, this Court concludes that Orix's security interest is perfected against Debtor whether the paver is defined as an ordinary good or a mobile good. This does not end the analysis however. Debtor has further asserted that it is entitled to avoid the security interest under the strong-arm powers found in 11 U.S.C. 544. That section provides that the bankruptcy trustee shall have the rights and powers of a judgment lien creditor, 544(a)(1), or an execution sale creditor, 544(a)(2). Debtor, as a Chapter 11 debtor-in-possession, has all the powers of a trustee, including those arising from 544. 11 U.S.C. 1107(a); In re Waters, 90 B.R. 946, 967 (Bankr. N.D. Iowa 1988).

The Court has concluded that Orix's security interest is effective against Debtor. Subsection (1) of 544 (a) cannot benefit Debtor in this situation because, under Iowa law, a judicial lien attaches only against real property of the debtor, not against personal property such as the paver. Iowa Code 624.23 (1). The rights of a creditor who obtains an execution, in relation to the rights of a party with a secured interest, are defined in Iowa Code chapter 626. If personal property taken on execution is subject to a security interest, the execution creditor must pay the secured party the amount of the secured debt plus interest. Iowa Code 626.34. Thus, Debtor's rights as an execution creditor under 544 (a)(2) remain subject to Orix's secured interest. Debtor may not utilize either 544(a)(1) or (2) to avoid Orix's security interest in the paver.

SUMMARY

Orix's security interest which was perfected in Indiana is effective against Debtor. Debtor purchased the paver before its removal from Indiana. Thus, it cannot benefit from sec. 554-9103(1)(d) which applies to security interests in ordinary goods purchased after removal from the state. Because neither Debtor nor Agee changed locations, sec. 554-9103(3)(e) does not apply to require Orix to reperfect in Iowa. Change of ownership between Agee and Debtor does not constitute a change of location of the debtor under that provision. Debtor may not avoid Orix's security interest under 544(a)(1) or (2). A hypothetical judicial lien creditor may only avoid liens on real property. A hypothetical execution sale creditor's rights to property are subject to secured interests under Iowa law.

WHEREFORE, Orix Credit Alliance, Inc. holds a perfected security interest in the slipform paver owned by Debtor.

FURTHER, Debtor may not avoid that security interest under 11 U.S.C. 544(a).

SO ORDERED this 25th day of February, 1997.

Paul J. Kilburg
U.S. Bankruptcy Judge