

Not Intended for Publication or Citation

UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF INDIANA
FORT WAYNE DIVISION

IN RE: CASE NO. 09-11860)	
)	
CHARLES CLIFFORD MCGEE)	
CARRIE MARIE MCGEE)	
)	
Debtors)	
)	
)	
CHARLES CLIFFORD MCGEE)	
)	
Plaintiff)	
)	
vs.)	PROC. NO. 10-1001
)	
BANC OF AMERICA PRACTICE)	
SOLUTIONS, INC.)	
)	
Defendant)	

DECISION AND ORDER ON MOTION FOR SUMMARY JUDGMENT

At Fort Wayne, Indiana, on September 9, 2010.

The plaintiff initiated this adversary proceeding to determine the validity and extent of the Banc of America’s lien on the assets of the debtor’s dental practice. Because the financing statement lists U.S. Bank as the holder of the lien, not the bank from which the debtor originally obtained the loan – Sky Bank – the debtor believes the lien has not been properly perfected. The matter is before the court on the defendant’s motion for summary judgment and the responses thereto.

Summary judgment is appropriate where there is “no genuine issue as to any material fact” and “the moving party is entitled to a judgment as a matter of law.” See, Fed. R. Civ. P. Rule 56(c); Fed. R. Bankr. P. Rule 7056. The moving party must initially identify “those portions of ‘the pleadings, depositions, answers to interrogatories, and admissions on file, together with the

affidavits, if any,' which it believes demonstrate the absence of a genuine issue of material fact.” Celotex Corp. v. Catrett, 477 U.S. 317, 323, 106 S.Ct. 2548, 2553 (1986). Once it does so, the non-moving party must affirmatively demonstrate, by specific factual allegations, that there is a genuine issue of material fact requiring trial. Matsushita Elec. Indus. Co., Ltd. v. Zenith Radio Corp., 475 U.S. 574, 587, 106 S.Ct 1348, 1356 (1986). In ruling on the motion, the court accepts the non-moving party’s evidence as true, draws all inferences in favor of the non-moving party, and does not weigh the evidence and credibility of the witnesses. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 249, 106 S. Ct. 2505, 2511 (1986).

The debtor argues that the financing statement lists a bank which was not originally a party to the loan and that any assignment to it did not take place before the financing statement was recorded; as a result it contends the lien has not been properly perfected and can be avoided. As debtor-in-possession, the plaintiff has most of the powers and duties of a trustee, 11 U.S.C. § 1107, including the ability to avoid unperfected security interests for the benefit of creditors. 11 U.S.C. § 544(a)(1). See also, In re Fowler, 201 B.R. 771, 779 (Bankr. E.D. Tenn.1996) (“If the holder of a security interest in the debtor’s property fails to perfect that interest prior to the filing of the bankruptcy, the trustee can avoid that interest, reducing the holder to the status of an unsecured creditor.”). That is what the debtor/plaintiff is seeking to do here. Whether the bank’s security interest is unperfected is a matter of state law, see, Butner v. United States, 440 U.S. 48, 54-57, 99 S.Ct. 914 (1979), and the determination is made as of the date of the petition. See, 11 U.S.C. § 544 (trustee’s powers arise “as of the commencement of the case.”).

The debtor borrowed money from Sky Bank and gave it a security interest in the debtor’s business assets. Shortly thereafter, on December 28, 2001, a financing statement was filed which

identified U.S. Bank as the secured party, rather than Sky Bank. A few months later, Sky Bank assigned the loan (together with a number of other loans) to Sky Financial Securitization Corp. IV. In order to finance the purchase of those loans, Sky IV assigned its interest in the security interest to U.S. Bank, although Sky IV continued to service the loan. Subsequently, Sky sold its interests to MBNA which took over servicing the loans for U.S. Bank. Bank of America then acquired the loans from MBNA and is the current servicer for U.S. Bank. Because the assignment to U.S. Bank occurred about five months after the financing statement identifying it as the secured lender, the debtor argues that the financing statement was ineffective to perfect the security interest.

A security interest and perfection of it are two separate things. No one argues that Sky or any of its successors, including the defendant, do not have a security interest in the debtor's business assets. Rather, the argument is centered around whether that interest was properly perfected and, if not, whether it can be avoided by the debtor-in-possession for the benefit of creditors. Perfection of this type of security interest occurs when a financing statement is filed with the appropriate authority. IC 26-1-9.1-308; 26-1-9.1-312; 26-1-9.1-501. The financing statement must contain the name of the debtor, the name of secured party or its representative, and describe the collateral subject to the security agreement. IC 26-1-9.1-502(a). These simple requirements comport with the "notice filing" concept embodied in Article 9 of the U.C.C.

What is required to be filed is not the security agreement itself, but only a simple notice which may be filed before the security interest attaches or thereafter. The notice itself indicates merely that the secured party who has filed may have a security interest in the collateral described. Further inquiry from the parties concerned will be necessary to disclose the complete state of affairs. IC 26-1-9.1-502, Official Comment ¶ 2 (emphasis added).

"[T]he purpose of the filing statute is to enable the public to know whether particular

personal property is encumbered or not.” Wolf v. Aero Factors Corp., 126 F. Supp. 872, 876 (S.D. N.Y. 1954). The identification of the secured creditor on the financing statement simply provides interested parties with a starting point from which to get more information. In re Bethel Marine, Inc., 1989 WL 1631581 (Bankr. D. Minn. 1989). Financing statements “serve[] only to mark certain collateral of the debtor as potentially subject to a claim.” InterBusiness Bank, N.A. v. First National Bank of Mifflintown, 318 F. Supp. 2d 230, 240 (M.D. Pa. 2004). Furthermore, the financing statement “may be filed before a security agreement is made” or otherwise attaches. IC 26-1-9.1-502(d). See also, United States v. Gleaners & Farmers Co-Operative Elevator Co., 481 F.2d 104, 106 (7th Cir. 1973). If so, perfection occurs when the security interest attaches. IC 26-1-9.1-308(a). See also, Gibson County Farm Bureau Cooperative Assoc., Inc. v. Greer, 643 N.E.2d 313, 316 (Ind. 1994). So, even though U.S. Bank may not have held a security interest at the time the financing statement was filed, it obtained such an interest via an assignment at a later date; its interest became perfected at that time and remained so as of the date of the petition.¹

Although the financing statement reflecting U.S. Bank as the secured party was filed prior to the transfer of the security interest to it, once it obtained that interest, it was perfected and has remained so since. This assignment of interests from Sky Bank to U.S. Bank was not some sort of “floating lien,” see, Matter of E.A. Fretz Co., Inc., 565 F.2d 366 (5th Cir. 1978), or an undisclosed affiliate, see, In re Adirondack Timber Enterprise, Inc., 2010 WL 1741378 (Bankr. N.D. N.Y. 2010), as the debtor attempts to characterize it which might prevent perfection of the lien. Instead, it was

¹The U.C.C. provides for liberal treatment of assignments. InterBusiness Bank, N.A. v. First National Bank of Mifflintown, 318 F. Supp. 2d 230, 239 (M.D. Pa. 2004). If the creditor assigns its interest to another, there is no requirement that the assignment be noted on the financing statement. IC 26-1-9.1-310(c).

a simple assignment of a particular debt and the lien that secured it.

There are no genuine issues of material fact and the defendant is entitled to judgment as a matter of law. U.S. Bank's, and through the chain of title, Bank of America's, security interest was properly perfected as of the date of the petition and is not avoidable by the plaintiff/debtor.

SO ORDERED.

/s/ Robert E. Grant
Chief Judge, United States Bankruptcy Court