FILED
U.S. Bankruptcy Appellate Panel
of the Tenth Circuit
May 17, 2000
Barbara A. Schermerhorn
Clerk

NOT FOR PUBLICATION

UNITED STATES BANKRUPTCY APPELLATE PANEL

OF THE TENTH CIRCUIT

IN RE ELKINS WELDING & CONSTRUCTION, INC., Debtor.	BAP No. NM-00-004
TOM PARKER, Plaintiff – Counter-Defendant – Appellee, v. ELKINS WELDING & CONSTRUCTION, INC., Defendant – Appellee, LEA COUNTY STATE BANK, Defendant – Counter-Claimant – Third-Party Plaintiff – Appellant, ORALIA B. FRANCO, Trustee, Third-Party Defendant.	Bankr. No. 98-15031 Adv. No. 99-1111 Chapter 7 ORDER AND JUDGMENT*

Appeal from the United States Bankruptcy Court
for the District of New Mexico

Before CLARK, BOHANON, and MATHESON, Bankruptcy Judges.

CLARK, Bankruptcy Judge.

* This order and judgment has no precedential value and may not be cited, except for the purposes of establishing the doctrines of law of the case, res judicata, or collateral estoppel. 10th Cir. BAP L.R. 8010-2.

After examining the briefs and appellate record, the Court has determined unanimously to honor the parties' request for a decision on the briefs without oral argument. *See* Fed. R. Bankr. P. 8012; 10th Cir. BAP L.R. 8012-1(a). The case is therefore submitted without oral argument.

Lea County State Bank ("Lea") appeals an order of the United States Bankruptcy Court for the District of New Mexico granting a motion for summary judgment filed by Tom Parker ("Parker") and denying Lea's cross motion for summary judgment. For the reasons set forth below, we REVERSE the bankruptcy court's order and REMAND this matter to that court.

I. Background

On August 3, 1998, the debtor entered into an Auction Agreement with Parker-Braden Auctions ("PB"), a partnership, under which PB was to auction the debtor's equipment, including at least nine trucks or trailers ("Vehicles"), in October 1998. Parker, one of the partners of PB, personally advanced the debtor $35,000, which was to be repaid from the proceeds of the auction. Although a written security agreement was never entered into between the parties, the debtor allowed Parker's name to be noted as a lienholder on the titles to the Vehicles by the New Mexico Department of Motor Vehicles ("DMV") on the same day that the loan was made to the debtor. Between August 5 and 10, 1998, the equipment, including the Vehicles, were brought by the debtor to either Parker at PB, to PB as Parker's agent, or to PB.[1]

On August 7, 1998, Lea obtained a judicial lien against the debtor in a state court action, and on August 10, 1998, a writ of attachment was served on the debtor. Our record does not indicate whether the writ of attachment was ever

[1] There is nothing in the record that evidences whether the debtor delivered the Vehicles to Parker at PB, or to PB as Parker's agent, so that Parker's security interest would attach, or whether it was delivering the Vehicles to PB to be sold at auction as required under ¶ 8 of the Auction Agreement.

executed on the Vehicles.

On August 13, 1998, the debtor sought relief under Chapter 11 of the Bankruptcy Code. The bankruptcy court entered an order approving the debtor's application to employ PB to liquidate certain of the debtor's assets, and an order granting the debtor's motion for approval to sell the assets outside of the ordinary course of business and free and clear of liens. PB sold the assets approved for sale, including the Vehicles, and in accordance with the terms of the court's Order, the proceeds of that sale were held in trust.

Parker subsequently commenced an action against the debtor and Lea, seeking a determination as to the validity, priority, and extent of his alleged lien in the Vehicles. In July 1999, the debtor's Chapter 11 case was converted to one under Chapter 7, and Lea filed a third-party complaint against the Chapter 7 trustee.[2] Lea also filed an answer and counterclaim against Parker, asserting, alternatively, that Parker's lien was unenforceable, its lien on the Vehicles was superior to that held by Parker, Parker's lien was avoidable under section 544(a)(1), and that the trustee may have an interest in the proceeds from the Vehicles.

Parker and Lea filed cross-motions for summary judgment, and the bankruptcy court entered an Order granting Parker's motion for summary judgment. In support of its Order, the court issued a Memorandum Opinion holding that Parker perfected his interest in the Vehicles as a matter of law under N.M. Stat. Ann. § 66-3-202(B) by having his name noted on the titles to the Vehicles. The court refused to address Lea's argument that Parker's interest in the Vehicles was unenforceable because it did not "attach" due to a lack of a written security agreement or possession, stating:

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[2] According to the bankruptcy court's docket sheet, which was included in our record, the trustee answered the third-party complaint, but did not otherwise participate in the proceedings before the bankruptcy court.

> The Defendant [Lea] argues that [Parker's] security interest is not enforceable because it did not attach. Under the Uniform Commercial Code, a security interest is enforceable once three requirements have been met: 1) there is a security agreement or the secured party has possession of the collateral, [2)] value has been given, and [3)] the Debtor has an interest in the collateral. When these three requirements have been met, the security interest is said to have attached. Under the UCC, attachment is a prerequisite of acquiring a perfected security interest. [Lea] argues that [Parker's] security interest did not attach because [Parker] never had possession. This Court need not address the issue of whether [Parker] actually or constructively had possession because this opinion is based on other grounds.

Memorandum Opinion, p. 3 n.2.

Lea timely filed a notice of appeal from the bankruptcy court's final Order and Memorandum Opinion, and the parties have consented to this Court's jurisdiction. *See* 28 U.S.C. §§ 158(a)(1) & (c)(1); Fed. R. Bankr. P. 8001(a) & 8002(a); 10th Cir. BAP L.R. 8001-1.

II. Standard of Review

In reviewing orders on summary judgment motions, the Tenth Circuit has stated:

> "We review the grant or denial of summary judgment de novo, applying the same legal standard used by the [trial] court pursuant to Fed. R. Civ. P. 56(c). Summary judgment is appropriate if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. When applying this standard, we examine the factual record and reasonable inferences therefrom in the light most favorable to the party opposing summary judgment. If there is no genuine issue of material fact in dispute, then we next determine if the substantive law was correctly applied by the [trial] court."

Kaul v. Stephan, 83 F.3d 1208, 1212 (10th Cir. 1996) (quoting Wolf v. Prudential Ins. Co., 50 F.3d 793, 796 (10th Cir. 1995) (further citations omitted)). In the present appeal, the issue is whether the bankruptcy court correctly applied the substantive law. We therefore review this matter *de novo*.

III. Discussion

The bankruptcy court focused on the concept of "perfection" of an interest in a vehicle. It correctly held that an interest in a vehicle is perfected when the lienholder is noted on the certificate of title. N.M. Stat. Ann. §§ 66-3-201 & 66-3-202(B). Nobody has challenged this conclusion of law on appeal. What is contested is whether the bankruptcy court should have even reached the issue of perfection if Parker's interest in the Vehicles did not "attach," an issue the bankruptcy court expressly refused to consider. Parker argues for the first time on appeal that there is no requirement that an interest in a vehicle "attach," as that term is defined in New Mexico's Commercial Code. We disagree.

Article 9 of the New Mexico Commercial Code, which adopts Article 9 of the Uniform Commercial Code, states that it applies to "any transaction (regardless of its form) which is intended to create a security interest in personal property . . . including goods." N.M. Stat. Ann. § 55-9-102(1); *see id.* § 55-9-104 (defining transactions excluded from Article 9). The word "'goods' includes all things which are movable at the time the security interest attaches." *Id.* § 55-9-105(1)(h). These definitions indicate that, unless expressly stated otherwise, motor vehicles, such as the Vehicles, are subject to Article 9's requirements. This conclusion is supported by the Official Comment to § 55-9-102, which states:

> The main purpose of this section is to bring all consensual security interests in personal property and fixtures under this article, except for certain transactions excluded by Section 9-104. . . .
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> 1. Except for sales of accounts and chattel paper, the principal test whether a transaction comes under this article is: is the transaction intended to have effect as security? . . .
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> 5. While most sections of this article apply to a security interest without regard to the nature of the collateral or its use, some sections state special rules with reference to particular types of collateral.

In addition, although New Mexico's Motor Vehicle Code, found at Chapter

66 of the New Mexico Statutes Annotated, creates special rules related to the perfection of a secured interest in a vehicle, its provisions support the application of Article 9 to secured transactions involving vehicles. Section 66-3-201, which governs the perfection of a secured interest in a vehicle, states: "A security interest in a vehicle of a type required to be titled and registered in New Mexico is not valid against attaching creditors, subsequent transferees or lienholders unless perfected as provided by this section." *Id.* § 66-3-201(A). This section assumes the existence of a valid security interest between the debtor and the secured party, with its perfection under section 66-3-201 making the interest valid against third-party creditors. There are no provisions in Chapter 66 defining the requirements for the creation of a valid security interest as between the debtor and the secured creditor. Accordingly, both the provisions of New Mexico's Commercial Code and Motor Vehicle Code make clear that, with the exception of the perfection requirements set forth in Chapter 66, Article 9 applies to security interests in vehicles.

Article 9 being applicable to the transaction between Parker and the debtor, the rules of attachment must be applied. As stated by the bankruptcy court, New Mexico's Commercial Code provides that a security interest in goods is not enforceable absent attachment, and that attachment is a prerequisite to acquiring a perfected security interest. Memorandum Opinion, at p. 3 n.2; N.M. Stat. Ann. § 55-9-203(2). The Commercial Code is clear that a security interest does not attach, and is not enforceable, unless (1) the debtor has signed a security agreement which describes the collateral or the secured party possesses the collateral, (2) value has been given, and (3) the debtor has rights in the collateral. *Id.* § 55-9-203(1). "A security interest attaches when it becomes enforceable against the debtor with respect to the collateral. Attachment occurs as soon as all of the events specified [above] have taken place . . . ." *Id.* § 55-9-203(2). A

security agreement gives the secured party a right to proceeds. *Id.* § 55-9-203(3). The Official Comment to § 55-9-203 states:

> 1. Subsection (1) states three basic prerequisites to the existence of a security interest: agreement, value, and collateral. In addition, the agreement must be in writing unless the collateral is in the possession of the security party (including an agent on his behalf . . .). When all of these elements exist, the security agreement becomes enforceable between the parties and is said to "attach." Perfection of a security interest . . . will in many cases depend on the additional step of filing a financing statement . . . or possession of the collateral . . . .
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> . . . .
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> 3. One purpose of the formal requisites stated in Subsection (1) is evidentiary. The requirement of written record minimizes the possibility of future dispute as to the terms of a security agreement and as to what property stands as collateral for the obligation secured. Where the collateral is in the possession of the secured party, the evidentiary need for a written record is much less than where the collateral is in the debtor's possession; customarily, of course, as a matter of business practice the written record will be kept, but, in this article as at common law, the writing is not a formal requisite. . . .
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> . . . .
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> 5. The formal requisite of a writing stated in this section is not only a condition to the enforceability of a security interest against third parties, it is in the nature of a statute of frauds. Unless the secured party is in possession of the collateral, his security interest, absent a writing which satisfies Paragraph (1)(a), is not enforceable even against the debtor, and cannot be made so on any theory of equitable mortgage or the like. If he has advanced money, he is of course a creditor and, like any creditor, is entitled after judgment to appropriate process to enforce his claim against his debtor's assets; he will not, however, have against his debtor the rights given a secured party by Part 5 of this article on default.

It is undisputed in this case that a written security agreement does not exist. The validity of Parker's secured interest in the Vehicles and the proceeds therefrom, thus, depends on whether he was "in possession" of the Vehicles. Yet, the bankruptcy court expressly refused to rule on this issue. In light of this fact, and the fact that the matter was disposed of by summary judgment, this case must

be remanded to the bankruptcy court to determine whether it has sufficient undisputed facts to grant summary judgment on the issue of possession.

IV. Conclusion

For the reasons set forth herein, the bankruptcy court's Order is REVERSED, and the matter is REMANDED to the bankruptcy court for further proceedings.