NOT FOR PUBLICATION

UNITED STATES BANKRUPTCY APPELLATE PANEL

OF THE TENTH CIRCUIT

IN RE FLOYD SIMS and CYNTHIA SIMS, Debtors.	BAP No. NM-02-069
LEA COUNTY STATE BANK, Plaintiff – Appellant, v. EUNICE PUBLIC SCHOOLS; KELLEY L. SKEHEN, Trustee; and PUCCINI & MEAGLE, P.A., Appellees, FLOYD SIMS and CYNTHIA SIMS, Defendants – Appellees.	Bankr. No. 7-99-14093 MR Adv. No. 99-1199 M Chapter 7 ORDER AND JUDGMENT*

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

Before BOHANON, MICHAEL, and NUGENT, Bankruptcy Judges.[1]

MICHAEL, Bankruptcy Judge.

In this appeal, we are asked to decide whether the bankruptcy court

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* This order and judgment is not binding precedent, except under the doctrines of law of the case, res judicata, and collateral estoppel. 10th Cir. BAP L.R. 8018-6(a).

[1] The parties did not request oral argument, and after examining the briefs and appellate record, the Court has determined unanimously that oral argument would not materially assist in the determination of this appeal. Fed. R. Bankr. P. 8012. The case is therefore ordered submitted without oral argument.

correctly determined that an assignment of a right to payment from a Chapter 13 Trustee operated as an absolute conveyance of that right and was superior to the claim of a judgment lienholder. Finding no reversible error, we affirm.

I. Background

Sometime in 1999, Floyd Sims and Cynthia Sims ("Debtors") filed a petition for relief under Chapter 7 of the Bankruptcy Code (the "First Case").[2] Debtors were represented by Puccini & Meagle, P.A. ("P & M"), an Albuquerque law firm. Lea County State Bank ("Bank") filed an adversary proceeding seeking to have the debt owed to it by the Debtors determined non-dischargeable under § 523(a)(2)(A). On September 6, 2001, the bankruptcy court entered an order finding said debt to be non-dischargeable, and entered judgment in favor of the Bank and against Debtors in the amount of $329,732.18, plus attorneys' fees.

On September 18, 2001, Debtors filed a petition for relief under Chapter 13 of the Bankruptcy Code (the "Second Case"). P & M represented Debtors in the Second Case. In the course of its representation of the Debtors, P & M accrued unpaid fees of approximately $80,000. While the Second Case was pending, Debtors paid approximately $6,000.00 (the "Funds") to Kelley Skehen ("Skehen"), the duly appointed Chapter 13 Trustee.

Bank sought and ultimately obtained dismissal of the Second Case on April 1, 2002. On April 3, 2002, Debtors executed and delivered to Skehen a document entitled "Assignment and Grant of Lien" (the "Assignment"). The Assignment contained the following language:

> We, the undersigned, do hereby request and direct the Chapter 13 Trustee to pay the entire balance of funds which have been paid by Floyd and Cynthia Sims to the Chapter 13 Trustee during pendency of United States Bankruptcy Case No. 13-01-16327 MA immediately on dismissal of said case and I [sic] request and direct that the Chapter 13 Trustee send the funds to:

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[2] Unless otherwise noted, all statutory references are to sections of the United States Bankruptcy Code, 11 U.S.C.A. § 101 *et seq*. (West 2003).

PUCCINI & MEAGLE, P.A.
[ADDRESS]

> We do hereby assign all of my [sic] right, title and interest in said funds to Puccini & Meagle, P.A.
>
> We further grant to Puccini & Meagle, P.A. a lien on all above described funds, on account of the debt owed to Puccini & Meagle, P.A. by us, in the amount of over $80,000.00.
>
> Further, we acknowledge that the enforcement and interpretation of this assignment and lien and the obligation represented hereby is to be governed exclusively by the laws of the State of New Mexico. We also hereby waive any legal restrictions on the enforcement or operation of this assignment and grant of lien, and we direct that its provisions be complied with.

Assignment, *in* Appellant's App. at 46. P & M never filed a financing statement with respect to the Assignment, nor was the Assignment ever filed of record with any public official.

On April 12, 2002, Bank filed an amended application for a writ of garnishment against Skehen (the "Garnishment"), seeking to garnish the Funds for application against its judgment against the Debtors. The Garnishment was issued on April 15, 2002, and served upon Skehen on April 17, 2002. Skehen filed her response to the Garnishment on April 19, 2002. In her response, Skehen acknowledged that she held the Funds, attached a copy of the Assignment, and stated that she would "await a court determination as to the proper recipient of the funds." Response at 2, *in* Appellant's App. at 43.

On May 2, 2002, Bank filed a pleading with the bankruptcy court entitled "Traverse to Response of Garnishee Chapter 13 Trustee and Notice of Dispute of Assignment of Grant of Lien" (the "Traverse"). In the Traverse, Bank alleged that it was entitled to the Funds by virtue of the Garnishment and that its claim was superior to the claim of P & M under the Assignment.[3] P & M took issue

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[3] There was also an issue with respect to an alleged wage assignment delivered by P & M to Eunice Public Schools ("EPS"), the employer of one of the Debtors. The trial court ruled in favor of the Bank with respect to the funds held

(continued...)

with the Bank's position, and contended that it was the owner of the Funds. The matter was submitted to the bankruptcy court on stipulated facts. The bankruptcy court found that the Assignment was valid, and constituted an absolute assignment of all of Debtors' right, title and interest in the Funds. The bankruptcy court determined that, as a result of the Assignment, P & M, and not the Debtors, was the rightful owner of the Funds at the time Bank served the Garnishment. Accordingly, the trial court ruled in favor of P & M. This appeal followed.

II. Jurisdiction

This Court has jurisdiction to hear timely-filed appeals from "final judgments, orders, and decrees" of bankruptcy courts within the Tenth Circuit, unless one of the parties elects to have the district court hear the appeal. 28 U.S.C. § 158(a)(1), (b)(1), and (c)(1); Fed. R. Bankr. P. 8002. Neither party elected to have this appeal heard by the United States District Court for the District of New Mexico, thus consenting to review by this Court.

A decision is considered final if "'it ends the litigation on the merits and leaves nothing for the court to do but execute the judgment.'" *Quackenbush v. Allstate Ins. Co.*, 517 U.S. 706, 712 (1996) (quoting *Catlin v. United States*, 324 U.S. 229, 233 (1945)). In this case, the order of the bankruptcy court determined the priority of P & M and the Bank in the funds held by Skehen. Nothing remains for the trial court's consideration. Thus, the order is "final" for purposes of 28 U.S.C. § 158.

III. Standard of Review

Bank asks this court to reverse the determination of the bankruptcy court that the Assignment is not governed by Article 9 of the New Mexico Uniform

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[3] (...continued)
by EPS. That portion of the decision was not appealed by P & M.

Commercial Code. The bankruptcy court's interpretation of a statute is a question of law that we review *de novo*. *See In re Gledhill,* 164 F.3d 1338, 1340 (10th Cir. 1999). When reviewing questions of law *de novo*, the appellate court is not constrained by the trial court's conclusions, and may affirm the trial court on any legal ground supported by the record. *See Wolfgang v. Mid-America Motorsports, Inc.,* 111 F.3d 1515, 1524 (10th Cir. 1997). The bankruptcy court's findings of fact, including those based on the parties' stipulations, are not to be set aside unless clearly erroneous. Fed. R. Bankr. P. 8013; *see also First Bank v. Reid (In re Reid)*, 757 F.2d 230, 233-34 (10th Cir. 1985). "A finding of fact is 'clearly erroneous' if it is without factual support in the record, or if the appellate court, after reviewing all the evidence, is left with a definite and firm conviction that a mistake has been made." *Cowles v. Dow Keith Oil & Gas, Inc.*, 752 F.2d 508, 511 (10th Cir. 1985) (citation omitted).

IV. Discussion

Bank argues that the Assignment is a mere attempt by the Debtors to grant P & M a security interest in the Funds and that, due to the failure of P & M to file any sort of financing statement with respect to the Assignment, the interests of P & M in the Funds are junior and inferior to the rights of the Bank. P & M contends that the Assignment is an absolute assignment of all of the Debtors' right, title and interest in the Funds and that, as such, issues regarding lien priority are not applicable. This Court agrees with P & M.

In reaching his decision, the bankruptcy court determined that:

> P & M's Assignment and Grant of Lien clearly reflects an intent to transfer "all right, title and interest" in the funds held by the Chapter 13 Trustee to P & M. Thus it was a valid assignment of an interest. *See* Restatement (First) of Contracts § 149(1) (Defining an assignment as "A manifestation to another person by the owner of the right indicating his intention to transfer, without further action or manifestation of the intention, the right to such other person or to a third person."); *see also, In re Long Development, Inc.*, 211 B.R. 232, 239 (Bankr. W.D. Mich. 1994) ("[A]n assignment in law is defined as "A transfer or setting over of property or of some right or

> interest therein, from one person to another, and unless in some way qualified, it is properly the transfer of one's whole interest in an estate, chattel, or other thing. It is the act by which one person transfers to another, or causes to vest in another his right or property or interest therein.") (quoting 4 Am.Jur. p. 229.J). Following such assignment, P & M became the owner of the funds. The Court, therefore, concludes that the Assignment and Grant of Lien executed by the Sims and delivered to the Chapter 13 Trustee prior to LCSB's [Bank's] service of its Writ of Garnishment gives P & M a superior claim to the funds held by the Chapter 13 Trustee.

Memorandum at 7-8, *in* Appellant's App. at 125-26. The bankruptcy court's legal analysis is well supported, both in the treatises and case cited by said court, and in other decisions as well. *See, e.g., Patrons State Bank & Trust Co. v. Shapiro*, 528 P.2d 1198, 1203 (Kan. 1974) (assignment "passes all of the assignor's title or interest to the assignee, and divests the assignor of all right of control over the subject matter of the assignment"). Under New Mexico law, "the character of an instrument is not controlled by its form, 'but from the intention of the parties as shown by the contents of the instrument.'" *Quantum Corp. v. State of New Mexico*, 956 P.2d 848, 851 (N.M. Ct. App. 1998) (quoting *Transamerica Leasing Corp. v. Bureau of Revenue*, 450 P.2d 934, 937-38 (N.M. Ct. App. 1969)). The factual finding that the Assignment constituted an absolute unconditional assignment of Debtors' rights to the Funds is fully supported by the language contained in the Assignment. There is no basis in fact or law upon which to reverse the bankruptcy court's decision.

Bank spends considerable time arguing that the bankruptcy court incorrectly characterized the Funds as an account under the New Mexico UCC. Bank contends that the Funds constituted a general intangible. While the Bank may be correct, the distinction is irrelevant. Regardless of the nature of the property interest, Debtors assigned all of their interest in the Funds to P & M prior to the Bank's garnishment. There is no issue of lien priority in this case because, at the time of the Garnishment, P & M did not have a security interest in the Funds; instead, it held title to the Funds.

Bank's argument that the Assignment is governed by the New Mexico Uniform Commercial Code (the "UCC") is without merit. Section 9-109(a)(1) of the UCC provides that the UCC applies to "a transaction, regardless of its form, that creates a security interest in personal property." N.M. Stat. Ann. § 55-9-109(a)(1) (West 2003). The UCC goes on to define a security interest as "an interest in personal property or fixtures which secures payment or performance of an obligation . . . ." N.M. Stat. Ann. § 55-1-201(37) (West 2003) (emphasis added). The Assignment did not secure the payment or performance of any obligation of the Debtors to P & M; instead, it was a means of partial payment of Debtors' obligations to P & M. By its own terms, the UCC does not apply to the Assignment.

V. Conclusion

The order of the bankruptcy court is affirmed.