

UNITED STATES BANKRUPTCY COURT  
FOR THE DISTRICT OF NEBRASKA

IN THE MATTER OF )

MILLARD AVIATION, INC., )

CASE NO. BK78-0-1234

BANKRUPT )

BANK OF PAPIILLION, )  
A Corporation, )

Plaintiff )

vs. )

MERLE NICOLA, Trustee, )

Defendant )

MEMORANDUM OPINION

This case was submitted for decision on the basis of stipulated facts and exhibits. It presents only one factual issue, which is whether two steel buildings attached to a concrete foundation are fixtures or personalty. If the buildings are personalty, the security agreement and financing statement were properly filed with the County Clerk. If the buildings are fixtures, these documents should have been filed with the Register of Deeds and the plaintiff's security interest may be unperfected.

The buildings in question were placed on ground leased to the debtor by the Omaha Airport Authority. The buildings were fixed to concrete foundations with steel bolts. After they were fixed in place, plumbing, electrical and heating systems were installed. The lease provided that the tenant had the right to remove all structures on the leased land at the expiration of the lease, but the actual procedure would have been to attempt to sell the buildings to a new tenant. The buildings could not be moved to another location without substantial expense and damage to their structure. Due to these factors, the market value of the buildings alone, as opposed to the buildings as structures affixed to the ground, would be minimal at best.

Although the law of fixtures is often ambiguous, there can be no uncertainty in this case. When structures are attached to concrete foundations and cannot thereafter be removed without substantial or total reduction of their value, the structures cease to be personalty and become fixtures. See Tillotson v. Stephans, 195 Neb. 104, 237 N.W. 2d 108 (1975). The clause

of the lease permitting removal of such structures does not affect my conclusion, as that clause is constructed broadly enough to cover any building which might have been placed on the premises, including the airport terminal itself.

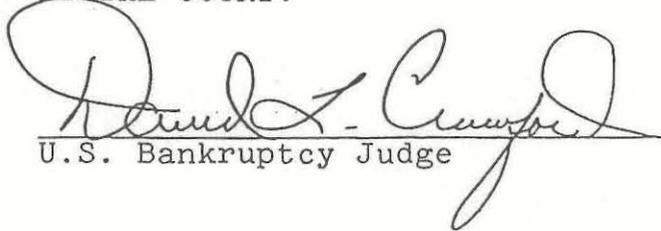
As the buildings were fixtures, it was necessary to file the financing statements in the office of the Register of Deeds in order to perfect a security interest in them. Neb. Rev. Stat. U.C.C. §9-401(1)(b); Tillotson v. Stephans, supra. Neb. Rev. Stat. U.C.C. §9-401(2) provides that a good faith filing in an improper place shall be effective against any person with knowledge of the security interest. However, a trustee in bankruptcy occupies the status of a lien creditor without knowledge of the security interest unless it is shown that all creditors represented in the bankruptcy proceeding had knowledge of the security interest. Neb. Rev. Stat. U.C.C. §9-301(3). Furthermore, under §70(c) of the Bankruptcy Act, the trustee has the status of a lien creditor without notice, regardless of the knowledge of any actual creditor. See 4B Collier on Bankruptcy, para. 70.53 at 636-37 (14th ed. 1978).

The buildings have been sold and the plaintiff allowed to transfer whatever security interest it had up to \$7,763.05 to the proceeds. As the plaintiff has no lien on the proceeds, it is an unsecured creditor with a claim in that amount.

A separate order is entered in accordance with the foregoing.

DATED: September 19, 1980.

BY THE COURT:

  
U.S. Bankruptcy Judge

Copies mailed to each of the following:

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