

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEBRASKA

IN RE:)
)
 DALE LINKE, et al.,)
)
 Debtors.)
)
 C. G. WALLACE, III, Trustee)
 of Dale Linke,)
)
 Plaintiff,)
)
 vs.)
)
 FARMLAND SERVICE COOP, INC.,)
)
 Defendant.)

BK 82-00632

CV 83-0-631

MEMORANDUM AND ORDER

This matter is before the Court on appeal from a judgment entered on August 8, 1984, by the Bankruptcy Court for the District of Nebraska. Appellant, trustee of the Chapter 7 bankruptcy estate of Dale and Linda Linke, debtors, filed an adversary proceeding to void an alleged preferential transfer of funds to appellee, Farmland Service Coop, Inc. (Farmland), a creditor of the debtors. After a trial, the Bankruptcy Court entered judgment for Farmland, and the trustee appealed.

Within the week before filing their voluntary petition in bankruptcy, the debtors paid Farmland \$10,636.26 in exchange for release of their indebtedness to that creditor. Appellant seeks to recover this payment as a preferential transfer, 11 U.S.C. § 547(b).

Section 547(b) states:

. . . the trustee may avoid any transfer of property of the debtor --

(1) to or for the benefit of a creditor;

(2) for or on account of an antecedent debt owed by the debtor before such transfer was made;

(3) made while the debtor was insolvent;

(4) made --

(A) on or within 90 days before the date of the filing of the petition; or

(B) between 90 days and one year before the date of the filing of the petition, if such creditor, at the time of such transfer --

(i) was an insider; and

(ii) had reasonable cause to believe the debtor was insolvent at the time of such transfer; and

(5) that enables such creditor to receive more than such creditor would receive if --

(A) the case were a case under Chapter 7 of this title;

(B) the transfer had not been made; and

(C) such creditor received payment of such debt to the extent provided by the provisions of this title.

The first and fourth of these criteria are conceded, and the second, third and fifth criteria are in dispute. With respect to the fifth factor, the trustee urges that Farmland received more from the debtors' pre-petition payment than it would have received in the administration of the Chapter 7 estate. Id. § 547(b)(5).

On the other hand, Farmland claims a priority with respect to certain collateral in which it held a security interest and asserts that by virtue of its secured status, it would have realized at least \$10,636.26 from the sale of such collateral in connection with the bankruptcy proceeding. The trustee

counters, however, that another creditor held a senior security interest in all of the collateral claimed by Farmland, so that appellee has the status of an unsecured creditor entitled to no more than a share of the net assets of the estate which would be considerably less than \$10,636.26.

The creditors acquired their interests in the debtors' property as follows. On March 29, 1976, the debtors granted a blanket security interest to the Cozad State Bank and Trust Company (Cozad) in collateral "whether now owned or hereafter acquired by the debtors," including "all farm products, including but not limited to crops, livestock, and supplies used or produced in farming operations; all contract rights and accounts; and all . . . accessions and substitutions thereto; and all products and proceeds thereof" The bank initially perfected its security interest and has filed such continuation statements as have been necessary to remain continuously perfected.

The bank president testified at trial that as of the date of the petition in bankruptcy, the debtors owed Cozad \$27,720.97, together with an undetermined amount of interest for the month of March, 1982. This sum represents the deficiency owed Cozad after a sale of the collateral available to it either prior to or in the course of the bankruptcy proceedings.

On March 31, 1981, the debtors executed a security agreement granting Farmland a security interest in "proceeds from the sale of calves and corn grown and produced during 1981." Farmland filed the security agreement as a financing statement on April 6, 1981, in the office of the Dawson County, Nebraska, clerk.

As a result of these transactions, Farmland and Cozad held conflicting security interests in proceeds of the debtors' 1981 corn and calves. In light of the inadequate funds available for creditors and Cozad's substantial deficiency, the parties agree that unless Farmland's security was superior to Cozad's lien, Farmland received more from the debtors' pre-petition payment than it would have taken through distribution of the bankruptcy estate.

Farmland first bases its claim to a senior security interest on Neb. Rev. Stat. § 9-312(4) (1980), which grants priority to a purchase money security interest "perfected at the time the debtor receives possession of the collateral or within ten days thereafter." A "purchase money security interest" is defined in section 9-107 as a security interest which is:

(a) taken or retained by the seller of the collateral to secure all or part of its price; or

(b) taken by a person who by making advances or incurring an obligation gives value to enable the debtor to acquire rights in or the use of collateral if such value is in fact so used.

However, Farmland's security agreement and financing statement describe its collateral as "proceeds from the sale of calves and corn grown and produced during 1981," not the calves and corn themselves as well as proceeds. (Emphasis added.) Farmland has cited no authority to the effect that a description of collateral which merely purports to secure proceeds upon the sale of certain property should be interpreted to extend to the property itself before such sale. See generally, Kohl v. Lader's Tiffany Feed & Supply Co., Inc., 18 B.R. 670, 672 (Bankr. W.D. Wis. 1982) (secured party's description of the collateral is to be strictly construed).

Nor has Farmland offered any authority which would explain how a purchase money security interest may be obtained in "proceeds upon the sale of" other property. Neb. Rev. Stat. §§ 9-107; 9-306(1) (1980). See contra Northwestern Nat. Bank Southwest v. Lectro Syst., Inc., 22 UCC Rep. 199, 202 (Minn. 1977) (purchase money security interest can be acquired only in an "identifiable asset" obtained by the debtor through use of the funds loaned by the secured party referred to in section 9-107(b)).

Farmland also relies on section 9-312(2) which gives priority in certain circumstances to a later perfected security interest in crops. As stated, however, Farmland did not take a security interest in crops, only in proceeds.

Cozad, on the other hand, obtained and perfected a security interest in the debtors' present and after-acquired crops, livestock, products and proceeds. Its security interest in after-acquired crops attached when the crops were planted, United States v. Minster Farmers Coop. Exch., Inc., 430 F. Supp. 566, 569 (N.D. Ohio 1977), and in after-acquired livestock, when the debtor became entitled to possession, United States v. Pirnie, 339 F. Supp. 702, 710 (D. Neb. 1972), aff'd, 472 F.2d 712 (8th Cir. 1973). As stated, Farmland did not qualify for either exception set forth in sections 9-312(2) or (4). Thus, Cozad took priority over any subsequently perfected security interest by virtue of the first to file rule of section 9-312(5)(a), North Platte State Bank v. Production Credit Assoc. of North Platte, 189 Neb. 44, 56, 200 N.W.2d 1, 8 (1972), and in the proceeds thereof by virtue of Neb. Rev. Stat. § 9-306(2) (1980).

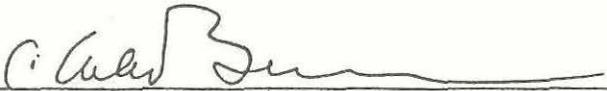
Farmland also contends that the debtors' pre-petition transfer was for present value rather than "on account of an antecedent debt," 11 U.S.C. § 547(b)(2), and that the debtors were not insolvent at the time of the payment. Id. § 547(b)(3). The Court finds, however, that Farmland did not provide "new value" for the pre-petition payment. In light of the Court's prior finding that Farmland was effectively reduced to unsecured status by Cozad's priority in the collateral and the insufficiency of the collateral even to satisfy the debt to Cozad, Farmland merely released a worthless security interest. The estate derived no equivalent value from the termination of Farmland's security interest. See 4 Collier on Bankruptcy § 547.40 (1983).

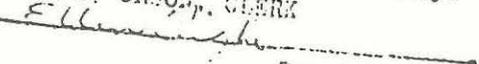
The Court has also considered Farmland's assertion that the debtors were solvent at the time of the pre-petition transfer, and finds the evidence advanced in support of this point unpersuasive and to a substantial degree merely speculative. Applying the "balance sheet" test, Nicholson v. First Investment Co., 705 F.2d 410 (11th Cir. 1983), the Court finds that the trustee carried his burden of proving that the debtors were insolvent at the pertinent time.

IT IS THEREFORE ORDERED that the judgment of the Bankruptcy Court is reversed.

DATED this 30th day of March, 1984.

BY THE COURT:


C. ARLEN BEAM
UNITED STATES DISTRICT JUDGE

I certify this to be a true copy of
the original record in my custody.
WILLIAM L. OLSON, CLERK
By 
Deputy Clerk