

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF NEBRASKA

IN THE MATTER OF:)
)
BTR PARTNERSHIP, originally)
filed as BTR FARMS,)
)
Debtor(s).)

CASE NO. BK01-41170

A01-4076

FARMERS STATE BANK OF NEBRASKA,)
)
Plaintiff,)

CH. 11

vs.)

CITIZENS BANK; STATE SAVINGS)
BANK; and BTR PARTNERSHIP,)
originally filed as BTR FARMS,)
)
Defendants.)

STATE SAVINGS BANK &)
CITIZENS BANK,)
)
Third-Party Plaintiffs,)

vs.)

TIMOTHY H. SHIRLEY &)
CAROLYN L. SHIRLEY,)
)
Third-Party Defendants.)

MEMORANDUM

RICHARD MYERS, Ch. 11 Trustee,)
)
Third-Party Plaintiff,)

vs.)

FARMERS STATE BANK; CITIZENS)
BANK; STATE SAVINGS BANK;)
TIMOTHY & CAROLYN SHIRLEY; and)
BTR PARTNERSHIP, originally)
filed as BTR FARMS,)

Third-Party Defendants.)
)

Hearing was held in Lincoln, Nebraska, on November 13, 2002, on various cross-motions for summary judgment:

Farmers State Bank's motion for summary judgment (Fil. #17), objection by Citizen Bank (Fil. #31); objection by State Savings Bank (Fil. #33); objection by Trustee (Fil. #52); objection by Tim Shirley (Fil. #61)

Citizens Bank's cross-motion for summary judgment (Fil. #30); State Savings Bank's motion for summary judgment (Fil. #34); Trustee's joinder in Defendants' motions (Fil. #49); response by Citizens Bank (Fil. #70)

Trustee's motion for summary judgment (Fil. #51); Farmers State Bank's response (Fil. #68); objection by Citizens Bank (Fil. #84)

Citizens Bank's & State Savings Bank's motion for summary judgment on third-party complaint (Fil. #57)

Richard Hoch appeared for Farmers State Bank, Rod Kubat appeared for Citizens Bank, Charles Smith appeared for State Savings Bank, and Alan Pedersen appeared for the trustee. This memorandum contains findings of fact and conclusions of law required by Fed. R. Bankr. P. 7052 and Fed. R. Civ. P. 52. This is a core proceeding as defined by 28 U.S.C. § 157(b)(2)(K).

I. Background

BTR Partnership is an Iowa partnership whose partners were, at the time of the transactions which are the subject matter of the adversary proceeding, Bob T. Shirley, Timothy H. Shirley, and Matthew K. Shirley. The partnership business included buying, raising, and selling livestock. The partnership used land which it owned or leased in the state of Iowa. Over several years prior to the bankruptcy being filed in April of 2001, BTR Partnership had a banking relationship with State Savings Bank, a bank that has one or more offices in the state of Iowa, and it may have had a banking relationship with Farmers State Bank of Nebraska, a bank which has one or more offices in the state of Nebraska.

In 1990, BTR Partnership granted State Savings a security interest in conjunction with receiving a loan and, on December 21, 1990, State Savings filed a U.C.C. financing statement with the Iowa Secretary of State's office as financing statement K199758 to perfect its interest in the collateral described in the financing statement and security agreement. That financing statement covered all farm products, including all livestock, together with their young, all substitution and replacements therefor and all proceeds thereof. The financing statement was signed by BTR Partnership, through the signatures of each of the general partners.

On June 28, 1995, State Savings filed a continuation statement, #K660667, continuing the financing statement and, on August 24, 2000, State Savings filed continuation statement #P124416, which was still in effect on the date of the bankruptcy filing.

On June 2, 1997, BTR Partnership borrowed \$1,385,000 from State Savings and granted, on that same date, a security interest in all farm products, livestock, and all increases and additions to and replacements of and substitutions for and the proceeds thereof. In 1998 and 1999, the note was modified, but the debtor had not repaid the note as of the date of the bankruptcy petition and the note, including its modifications, had matured and was due and payable in full on the date the bankruptcy case was filed.

The schedules of assets filed in the BTR Partnership bankruptcy case showed that BTR Partnership was the owner of a certain number of head of cattle. By agreement of the parties, the cattle were liquidated at the appropriate time and the Chapter 11 bankruptcy trustee is holding the proceeds, awaiting a final determination of the rights of the parties to some or all of the proceeds.

Prior to bankruptcy, the BTR Partnership had sold some of the cattle and used some of the proceeds from the sale of the cattle to pay down a note held by Farmers State Bank.

The Farmers State Bank note was executed by Timothy and Carolyn Shirley on March 3, 2000. It was in the original principal amount of \$251,044.07. The balance on it was due and payable on March 5, 2001.

To secure repayment of the indebtedness to Farmers State

Bank, Timothy and Carolyn Shirley granted a security interest in cattle to be purchased by the use of the loaned funds. The note is signed by the Shirleys individually, and there is no indication on the note that BTR Partnership was considered a borrower on the note. The note included the security agreement referred to above by which Timothy and Carolyn Shirley granted a security interest in cattle to be purchased by the use of the funds, but there is no indication on that portion of the document that BTR Partnership or any other entity carrying the "BTR" title granted a security interest in any property of BTR Partnership. Neither the note nor the security agreement included in the note were signed in a representative capacity by Timothy Shirley on behalf of the BTR Partnership.

To perfect the security interest granted by Timothy and Carolyn Shirley, the Farmers State Bank filed with the Iowa Secretary of State U.C.C. Financing Statement #P088332 on March 9, 2000. That financing statement described as collateral all farm products including, but not limited to, all livestock and their young, along with their products, produce, and replacements. The financing statement also provides that proceeds of the collateral are covered. The financing statement contains the names of the Shirleys as the debtors with the Shirleys' address and social security numbers. It also includes a reference to "BTR FRM" as a debtor. However, there is no indication on the financing statement that BTR Partnership, or any person acting in a representative capacity on behalf of BTR Partnership, signed the financing statement.

Farmers State Bank did not file a financing statement against BTR Partnership in conjunction with the March 2000 loan signed by Timothy and Carolyn Shirley.

On the date that Timothy and Carolyn Shirley executed the note to Farmers State Bank, March 3, 2000, Bob T. Shirley, father of Timothy Shirley, executed a personal guaranty as further security for the repayment of the Farmers State Bank note. In the guaranty, Timothy and Carolyn Shirley were listed as borrowers whose debt Bob T. Shirley guaranteed. BTR Partnership was not identified in the guaranty as a borrower. The debt which was guaranteed was described as "NOTE #123052, SIGNED BY TIMOTHY AND CAROLYN SHIRLEY FOR THE PURCHASE OF 400 HEAD OF CATTLE."

On the date the bankruptcy case was filed, the Farmers State Bank note had not been paid in full.

This adversary proceeding was originally filed by Farmers State Bank against State Savings Bank and Citizens Bank, an Iowa banking corporation that is a participant in the State Savings Bank loan to BTR Partnership. Farmers State Bank alleges that its loan was actually to BTR Partnership and that Timothy Shirley signed the note, security agreement, and U.C.C. financing statement in his representative capacity as a partner in the BTR Partnership, or his signature bound BTR Partnership to the terms of the loan, security agreement and financing statement simply by virtue of the fact that he was a partner in BTR Partnership. On that basis, Farmers State Bank claims that BTR Partnership is a debtor to Farmers State Bank, that BTR Partnership granted a security interest in the cattle which were purchased by BTR Partnership, and that the security interest is perfected. Further, Farmers State Bank asserts that its "loan" to BTR Partnership is a purchase money loan and that the funds were used to purchase the cattle, the proceeds of which are now being held by the trustee. As a result of its purchase money interest, Farmers State Bank claims that it takes priority over the competing security interest held by State Savings Bank.

The trustee, aligning himself with the position of State Savings Bank and Citizens Bank, takes the position that the Farmers State Bank loan was to Timothy Shirley and Carolyn Shirley and that they granted a security interest in any cattle that they purchased and owned. However, the trustee, State Savings Bank, and Citizens Bank take the further position that, as acknowledged by Farmers State Bank, the cattle in question here were not purchased by and were not owned by Timothy and Carolyn Shirley, but were purchased by BTR Partnership, using funds delivered to BTR Partnership by Timothy and Carolyn Shirley. Such funds were the funds borrowed by the Shirleys from Farmers State Bank.

In addition to challenging the existence of any security interest being held by the Farmers State Bank in BTR Partnership assets, the trustee takes the position that payments to Farmers State Bank by BTR Partnership during the 90-day period immediately prior to the filing of the bankruptcy petition amount to an avoidable preference. The trustee, therefore, not only wants a determination that Farmers State Bank has no perfected security interest of any sort, but that payments it received prior to the bankruptcy must be repaid to the trustee as representative of the bankruptcy estate.

State Savings Bank and Citizens Bank, although agreeing with

the trustee that Farmers State Bank does not have a validly perfected security interest in property of BTR Partnership, claim that the trustee does not have the right to possession of the payments made to Farmers State Bank within the 90 days prior to the bankruptcy case, because State Savings Bank and Citizens Bank claim a security interest in those funds. According to their argument, such a perfected security interest trumps the avoidance rights of the trustee. They further claim that Farmers State Bank's possession of the pre-petition funds is a violation of their security interest and is a conversion of those funds. They ask for a judgment against Farmers State Bank for the amount of those funds and that the funds be delivered to them for application on the outstanding loan of BTR Partnership.

All of the parties have motions for summary judgment on all of the issues.

II. Law

A. Summary Judgment Standard

Summary judgment is appropriate only if the record, when viewed in the light most favorable to the non-moving party, shows there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law. Fed. R. Civ. P. 56(c) (made applicable to adversary proceedings in bankruptcy by Fed. R. Bankr. P. 7056); see, e.g., Celotex Corp. v. Catrett, 477 U.S. 317, 322-23 (1986); Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 249-50 (1986); Morgan v. Rabun, 128 F.3d 694, 696 (8th Cir. 1997), cert. denied, 523 U.S. 1124 (1998); Get Away Club, Inc. v. Coleman, 969 F.2d 664, 666 (8th Cir. 1992); St. Paul Fire & Marine Ins. Co. v. FDIC, 968 F.2d 695, 699 (8th Cir. 1992).

In ruling on a motion for summary judgment, the court must view the facts in the light most favorable to the party opposing the motion and give that party the benefit of all reasonable inferences to be drawn from the record. Widoe v. District No. 111 Otoe County Sch., 147 F.3d 726, 728 (8th Cir. 1998); Ghane v. West, 148 F.3d 979, 981 (8th Cir. 1998).

Essentially, the test is "whether the evidence presents a sufficient disagreement to require submission to a jury or whether it is so one-sided that one party must prevail as a matter of law." Anderson v. Liberty Lobby, Inc., 477 U.S. at 251-52. Moreover, although under Federal Rule of Civil Procedure

56 due deference must be given to the rights of litigants to have their claims adjudicated by the appropriate finder of fact, equal deference must be given under Rule 56 to the rights of those defending against such claims to have a just, speedy and inexpensive determination of the action where the claims have no factual basis. Celotex Corp. v. Catrett, 477 U.S. at 327.

The court's role is simply to determine whether the evidence in the case presents a sufficient dispute to place before the trier of fact.

At the summary judgment stage, the court should not weigh the evidence, make credibility determinations, or attempt to determine the truth of the matter. Rather, the court's function is to determine whether a dispute about a material fact is genuine. . . . If reasonable minds could differ as to the import of the evidence, summary judgment is inappropriate.

Quick v. Donaldson Co., Inc., 90 F.3d 1372, 1376-77 (8th Cir. 1996) (internal citations omitted). See also Bell v. Conopco, Inc., 186 F.3d 1099, 1101 (8th Cir. 1999) (on summary judgment, court's function is not to weigh evidence to determine truth of any factual issue); Mathews v. Trilogy Communications, Inc., 143 F.3d 1160, 1163 (8th Cir. 1998) ("When evaluating a motion for summary judgment, we must . . . refrain from assessing credibility.").

A genuine issue of material fact exists if: (1) there is a dispute of fact; (2) the disputed fact is material to the outcome of the case; and (3) the dispute is genuine, meaning a reasonable jury could return a verdict for either party. RSBI Aerospace, Inc. v. Affiliated FM Ins. Co., 49 F.3d 399, 401 (8th Cir. 1995).

Upon a motion for summary judgment, the initial burden of proof is allocated to the movant in the form of demonstrating "that there is an absence of evidence to support the nonmoving party's case." Celotex Corp. v. Catrett, 477 U.S. at 325; see Prudential Ins. Co. v. Hinkel, 121 F.3d 364, 366 (8th Cir. 1997), cert. denied, 522 U.S. 1048 (1998); Jafarpour v. Shahrokhi (In re Shahrokhi), 266 B.R. 702, 706-07 (B.A.P. 8th Cir. 2001); Nelson v. Kingsley (In re Kingsley), 208 B.R. 918, 920 (B.A.P. 8th Cir. 1997).

When the movant makes an appropriate showing, the burden then shifts to the nonmoving party "to go beyond the pleadings and by her own affidavits, or by the 'depositions, answers to interrogatories, and admissions on file,' designate 'specific facts showing that there is a genuine issue for trial.'" Celotex, 477 U.S. at 324 (quoting Fed. R. Civ. P. 56(c), (e)).

To withstand a motion for summary judgment, the nonmoving party must submit "sufficient evidence supporting a material factual dispute that would require resolution by a trier of fact." Austin v. Minnesota Mining & Mfg. Co., 193 F.3d 992, 994 (8th Cir. 1999) (quoting Hase v. Missouri Div. of Employment Sec., 972 F.2d 893, 895 (8th Cir. 1992), cert. denied, 508 U.S. 906 (1993)). In this respect, the nonmoving party "must do more than simply show that there is some metaphysical doubt as to the material facts; [it] must show there is sufficient evidence to support a jury verdict in [its] favor." Chism v. W.R. Grace & Co., 158 F.3d 988, 990 (8th Cir. 1998). "[T]he mere existence of a scintilla of evidence in favor of the nonmoving party's position is insufficient to create a genuine issue of material fact." Rabushka ex rel. United States v. Crane Co., 122 F.3d 559, 562 (8th Cir. 1997) (internal quotation marks omitted) (quoting In re Temporomandibular Joint (TMJ) Implants Prods. Liab. Litig., 113 F.3d 1484, 1492 (8th Cir. 1997)), cert. denied, 523 U.S. 1040 (1998).

"Rule 56(c) mandates the entry of summary judgment, after adequate time for discovery and upon motion, against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial." Celotex, 477 U.S. at 322. "We look to the substantive law to determine whether an element is essential to a case, and only disputes over facts that might affect the outcome of the suit under the governing law will properly preclude the entry of summary judgment." Williams v. Marlar (In re Marlar), 252 B.R. 743, 751 (B.A.P. 8th Cir. 2000) (quoting Ries v. Wintz Properties, Inc. (In re Wintz Cos.), 230 B.R. 848, 858 (B.A.P. 8th Cir. 1999)) (internal quotations omitted).

B. Iowa U.C.C. law

In the absence of any conflict between state law and bankruptcy law, the law of the state where the property is situated governs questions of property rights. Johnson v. First Nat'l Bank, 719 F.2d 270, 273 (8th Cir. 1983), cert. denied, 465

U.S. 1012 (1984); United States v. Lincoln Sav. Bank (In re Commercial Millwright Serv. Corp.), 245 B.R. 597, 600 (Bankr. N.D. Iowa 1999) (citing In re McLaughlin Farms, Inc., 120 B.R. 493, 503 (Bankr. N.D. Iowa 1990)), aff'd, 245 B.R. 609 (N.D. Iowa 2000). As the debtor, the borrower, the banks, and the collateral were all located in Iowa, Iowa commercial law applies. The Commercial Millwright opinion by the bankruptcy court sets forth a primer on the creation and perfection of a security interest in Iowa under the pre-revision Article 9 that is applicable in the BTR case:

A security interest is created by a security agreement. Iowa Code § 554.9105(1). The basics of a security agreement are (1) a writing manifesting an intent to create or provide for a security interest, (2) signed by the debtor, and (3) containing a description of the collateral. F.S. Credit Corp. v. Shear Elevator, Inc., 377 N.W.2d 227, 231 (Iowa 1985).

. . .

. . . The intent of the parties is relevant in determining the validity of a security agreement. See In re Waters, 90 B.R. 946, 957 (Bankr. N.D. Iowa 1988). . . . Perfection of a security interest is governed by the mandates of the UCC, not the intent of the parties.

Most security interests in Iowa are perfected by filing a financing statement. Iowa Code § 554.9302. A financing statement is legally sufficient if it contains the names and mailing addresses of the debtor and secured party and a description of collateral, and is signed by the debtor. Merchants Nat'l Bank v. Halberstadt, 425 N.W.2d 429, 432 (Iowa App. 1988); Iowa Code § 554.9402(1). The validity of a financing statement depends primarily on its ability to give notice of the security interest to other creditors. In re Rieber, 740 F.2d 10, 12 (8th Cir. 1984) (applying Iowa law). If a document, filed with the appropriate authorities, satisfies all requirements of a valid financing statement and gives notice of a security interest, a perfected security interest is created. Id.

Commercial Millwright, 245 B.R. at 600-01.

The statutory mandates regarding security agreements and financing statements are strictly enforced. Commercial Millwright, 245 B.R. at 601 (citing C & H Farm Serv. Co. v. Farmers Sav. Bank, 449 N.W.2d 866, 870 n. 2 (Iowa 1989) and In re Rieber, 740 F.2d 10, 12 (8th Cir. 1984)).

Inquiry notice is the cornerstone of the U.C.C. requirements for perfection of a security interest. Commercial Millwright, 245 B.R. at 601 (citing Iowa Code § 554.9402, U.C.C. cmt 2). While a financing statement substantially complying with U.C.C. requirements may be effective even though it contains minor errors which are not seriously misleading, it is held to be ineffective if it is determined to be seriously misleading. Id. (citing Iowa Code § 554.9402(8)).

A financing statement may be filed before a security agreement is made or a security interest otherwise attaches, pursuant to Iowa Code § 554.9402(1). The Official Comment to § 9-303 states:

[T]he time of perfection is when the security interest has attached and any necessary steps for perfection (such as taking possession or filing) have been taken. If the steps for perfection have been taken in advance (as when the secured party files a financing statement before giving value or before the debtor acquires rights in the collateral), then the interest is perfected automatically when it attaches.

Iowa Code § 554.9303, cmt. 1 (1995).

C. Iowa partnership law

In Iowa, one partner's apparent authority to act on behalf of another partner can be established by the partner's course of conduct. Chapman's Golf Ctr. v. Chapman, 524 N.W.2d 422, 426 (Iowa 1994); Cooperative Fin. Ass'n, Inc. v. Garst, 917 F. Supp. 1356, 1380 (N.D. Iowa 1996). This apparent authority is also statutorily based. Cooperative Finance, 917 F. Supp. at 1380; Iowa Code § 486.9(1) [now Iowa Code § 486A.301]. Under the Iowa Code, in order to bind a partner, the Court must find the partner executing the agreement apparently acted to carry on partnership business in the usual way. Kristerin Dev. Co. v. Granson, 394 N.W.2d 325, 329 (Iowa 1986).

Maynard Sav. Bank v. Banke (In re Banke), 275 B.R. 317, 329 (Bankr. N.D. Iowa 2002).

Such a finding requires a two-step analysis:

First, the fact finder must determine whether the partner or partners executing the agreement apparently acted to carry on the partnership business in the usual way. An affirmative finding on this step ends the inquiry unless, in the second step of the analysis, it is shown the person with whom the partner was dealing knew the latter in fact had no authority to bind the partnership.

Kristerin Dev. Co. v. Granson Inv., 394 N.W.2d 325, 330 (Iowa 1986).

III. Decision

A. Judicial estoppel

Farmers State Bank has previously taken the position, both in this court and in state court proceedings, that the cattle belonged only to Timothy and Carolyn Shirley and not to BTR Partnership. It now takes the opposite position.

[The doctrine of judicial estoppel] prohibits a party who has successfully and unequivocally asserted a position in one proceeding from asserting an inconsistent position in a subsequent proceeding. Edwards v. Aetna Life Ins. Co., 690 F.2d 595, 598 (6th Cir. 1982); Moore v. United Serv. Auto. Ass'n, 808 F.2d 1147, 1153 n. 6 (5th Cir. 1987); United States v. Lehman, 756 F.2d 725, 728 (9th Cir. 1985); Middlekauff v. Lake Cascade, Inc., 110 Idaho 909, 915, 719 P.2d 1169, 1175 (1986); Rowland v. Klies, 726 P.2d 310, 316 (Mont. 1986); In re Parental Rights to ARW, 716 P.2d 353, 355-56 (Wyo. 1986). The doctrine is designed to protect the integrity of the judicial process by preventing intentional inconsistency. It addresses the incongruity of allowing a party to assert a position in one tribunal and the opposite in another, thereby creating the perception that at least one court has been misled. Edwards v. Aetna Life Ins. Co., 690 F.2d at 599.

. . . A fundamental feature of the doctrine is the successful assertion of the inconsistent position in a prior action. Absent judicial acceptance of the inconsistent position, application of the rule is unwarranted because no risk of inconsistent, misleading results exists. Edwards, 690 F.2d at 599; United States v. 49.01 Acres of Land, 802 F.2d 387, 390 (10th Cir. 1986); Moore, 808 F.2d at 1153; In re Parental Rights, 716 P.2d at 356.

Vennerberg Farms, Inc. v. IGF Ins. Co., 405 N.W.2d 810, 814 (Iowa 1987).

As noted, a key to the doctrine is the prior *successful* assertion of the inconsistent position. Roach v. Crouch, 524 N.W.2d 400, 403 (Iowa 1994); Graber v. Iowa Dist. Court, 410 N.W.2d 224, 227 (Iowa 1987). Here, Farmers State Bank was unsuccessful with its previous approach to the issue, so it argues in the alternative in this action. The doctrine of judicial estoppel does not preclude such strategic decisions.

B. Lien Priority

The cattle in existence on the date of the bankruptcy petition and the proceeds of such cattle were property of BTR Partnership and are property of the BTR Partnership bankruptcy estate. State Savings Bank has a duly perfected Uniform Commercial Code security interest in the cattle which were in possession of the debtor on the date the bankruptcy case was filed, and in the proceeds of such cattle. Farmers State Bank has no security interest in the cattle which were in the possession of and owned by BTR Partnership on the date the bankruptcy case was filed, or in the proceeds thereof. Judgment on the lien priority issues shall be entered in favor of State Savings Bank and against Farmers State Bank with regard to the proceeds of the cattle on hand on the petition date.

C. Preference/Conversion/Prepetition Payments to Farmers State Bank

There remain issues as among all of the parties concerning the amount of the payments to Farmers State Bank from proceeds of cattle which were subject to the lien of State Savings Bank; whether State Savings Bank knew of the payments by BTR Partnership to Farmers State Bank from the proceeds of the cattle, acquiesced in or consented to such payment; whether, if

there was no knowledge nor consent, there is a statute of limitations bar to recovery under a conversion theory of some or all of the payments; whether some payments made to Farmers State Bank were made by Timothy and Carolyn Shirley from their own funds, and if so, to what extent; and whether, as between State Savings Bank and the trustee, the lien rights and conversion claim held by State Savings Bank take priority over the preference avoidance rights of the trustee in bankruptcy. For these, and perhaps other reasons, summary judgment shall not be entered on the preference/conversion portion of this adversary proceeding.

IV. Discussion

Prior to the BTR Partnership bankruptcy filing, Farmers State Bank sued Timothy and Carolyn Shirley in state court in Iowa to replevin the cattle because the loan had not been paid in full on a timely basis. In that case, Farmers State Bank submitted an affidavit of C. K. Holmes II, the loan manager at Farmers State Bank. At paragraph 6 of that affidavit, which is Attachment 17 to the Index of Evidence submitted on behalf of Citizens State Bank, Filing No. 32 in the adversary file, Mr. Holmes, under oath, states:

That BTR Farms did not sign the original security agreement, and was only added to the financing statement to provide notice to third parties as to the bank's security interest in these cattle in the event the cattle were located on property operated by BTR Farms or sold for satisfaction of any obligation of the defendants to BTR Farms.

In this bankruptcy case, an affidavit of Mr. Holmes was also submitted. It is found in Filing No. 82, Plaintiff's Index of Evidence, Exhibit 8. In that affidavit, Mr. Holmes states at paragraph 2:

I was the principal bank officer involved in the loan transaction with Timothy H. Shirley and Carolyn L. Shirley rural Hamburg, Fremont County, Iowa farmers, which resulted in a loan evidenced by a promissory note to the Bank, dated March 13, 2000 [sic], in the principal sum of \$251,044.08, which loan was for Timothy H. Shirley and Carolyn L. Shirley to purchase cattle. A true and correct copy of said promissory note is attached hereto, marked as Exhibit

"A".

Then, at paragraph 7, Mr. Holmes states:

Payments on said loan have been made by both "Timothy Shirley" and by "BTR". A copy of a payment check from "BTR" is attached hereto, marked Exhibit "C"[.] The affiant has no specific knowledge if the correct name is "BTR", "BTR Farms" or "BTR Partners". The bank has never made a loan to either entity.

Finally, at paragraph 11 of the Holmes affidavit, it states: "The Bank made a similar loan to Thomas [sic] H. Shirley and his father, Robert Shirley, in the sum of \$200,000.00 on February 2, 1999 to purchase cattle. Said loan was repaid in full on February 11, 2000. BTR was not a part of that loan."

In the bankruptcy case, Farmers State Bank submitted an affidavit of Bradley W. Clark, president of Farmers State Bank of Nebraska. The affidavit was dated October 18, 2001, and is Exhibit 12 to Farmers State Bank's Index of Evidence (Fil. #82). In the affidavit, Mr. Clark states at paragraph 3:

The Bank has never made a loan to "BTR Farms", "BTR Partners", or "BTR". Your affiant was aware that Timothy H. Shirley was a partner with his father, Bob Shirley, and his brother, Rob Shirley, in a farming partnership and that the cattle purchased by Timothy H. Shirley and Carolyn L. Shirley may be pastured on property owned or leased by the family partnership. For that reason, BTR Farms was included on the UCC Financing Statement, giving notice of the Bank's security interest on cattle that may be maintained on BTR Farms property. . . .

At paragraph 4 of the same affidavit, Mr. Clark states: "Certain payments were made by 'BTR' upon the indebtedness of Timothy H. Shirley and Carolyn L. Shirley and your affiant has no personal knowledge as to the propriety of the names to 'BTR', 'BTR Farms', or 'BTR Partnership'."

In other words, Farmers State Bank, both in the Iowa District Court for Fremont County and in the United States Bankruptcy Court for the District of Nebraska, on more than one occasion has, through its employees and officers, denied that it ever intended to or did actually make a loan to any "BTR" entity

and that the inclusion of "BTR FRM" on the financing statement filed with the Iowa Secretary of State concerning the Timothy and Carolyn Shirley loan was for information purposes only and did not constitute a claim against any property of BTR Partnership.

V. Conclusion

The evidence is clear and there is no material issue of fact. The officers of Farmers State Bank had no intention of making a loan to BTR Partnership; did not consider Timothy Shirley as acting on behalf of the partnership; did not receive a security interest in partnership property; and did not file a financing statement to give notice that it claimed an interest in partnership property.

Farmers State Bank has no security interest in the cattle or the proceeds thereof which are the subject matter of this adversary proceeding. Judgment will be entered against Farmers State Bank and in favor of State Savings Bank and Citizens Bank on this issue.

DATED: January 30, 2003

BY THE COURT:

/s/Timothy J. Mahoney
Chief Judge

Notice given by the Court to:

*Richard Hoch
*Rod Kubat
*Charles Smith
*Alan Pedersen
*Richard Myers
U.S. Trustee

Movant (*) is responsible for giving notice of this order to all other parties not listed above if required by rule or statute.