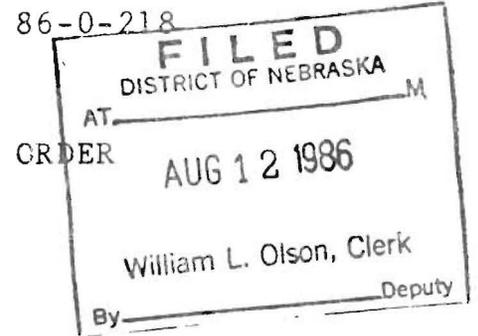


IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEBRASKA

IN RE:)
FRANK AND KAREN SWARTZ,)
Debtors.)
GERALD E. DEVINE, et al.,)
Plaintiffs,)
vs.)
FRANK AND KAREN SWARTZ,)
d/b/a OMAHA TRUCK PLAZA,)
Defendants.)

BK 84-1381

CV 86-0-218



This matter is before the Court on appeal from a final order of the Bankruptcy Court for the District of Nebraska entered March 5, 1986. The Bankruptcy Court entered judgment in this adversary proceeding in favor of the debtors-in-possession, Frank and Karen Swartz, and against the creditors Gerald and Margaret Devine. The Bankruptcy Court held that the creditors had no claim to funds held by the debtors-in-possession that resulted from the termination of the lease. The Court, after a review of the issues presented, finds that the decision of the Bankruptcy Court should be affirmed.

BACKGROUND

The essential facts of this case are not in dispute. The creditors leased a truck stop location from Omaha Truck Plaza, Inc. (Now HWH, Inc.). On December 15, 1982, the creditors sold the Omaha Truck Plaza business and assigned the lease to the debtors-in-possession. PX-1; Tr. 6:16-7:3. In conjunction with

the purchase agreement, the debtors-in-possession executed both a security agreement and a financing statement and delivered the documents to the creditors. PX-2, PX-3. The security agreement and financing statement were recorded with the Douglas County Clerk and the Secretary of State of the State of Nebraska. Tr. 8:14-25; 9:21-23. The security agreement and financing statement state that the security agreement covers, "all of debtors general intangibles, now owned or hereinafter acquired." PX-2; PX-3. The lease was not recorded with the Register of Deeds of Douglas County, Nebraska.

In November, 1983, the debtors-in-possession moved their place of residence to Albuquerque, New Mexico. Tr. 13:15-25; 14:3-9; 9:21-23. The debtors-in-possession also took their business records and key employees of the business. The debtors-in-possession also operated a number of other businesses, some in Nebraska and some in New Mexico. Tr. 23:21-24:10. The chief executive office of the debtors was located in New Mexico and the debtors-in-possession made purchases and paid bills from New Mexico, including for the Omaha business. Tr. 18:3-12; 26:5-28:7. The debtors-in-possession gave the creditors notice of the change in business location. The parties agreed to an amendment to the purchase agreement providing that all notices required under the agreement should be sent to the debtors at a New Mexico address. PX-6. The Omaha Truck Plaza continued to operate in Douglas County, Nebraska, until approximately December, 1984.

The debtors-in-possession were current in their payment to the plaintiffs pursuant to their written agreement until the debtors-in-possession filed Chapter 11 bankruptcy in July of 1984. Thereafter, no further payments were made to the creditors under the agreement.

The debtors-in-possession negotiated a settlement with the landlord for the unpaid lease payments due following their filing of bankruptcy. The settlement was made rather than an assumption of the lease and cure of the default. The settlement included a payment from the landlord of approximately \$100,000.00 to the debtors-in-possession as consideration of the termination of the rights of the debtors-in-possession to any interest in the lease.

During the trial of this matter, it was the creditors' position that the settlement and payment of the \$100,000.00 should accrue to their benefit as secured creditors and not to the benefit of the debtors-in-possession and/or other creditors. The creditors' theory was that the right to terminate the lease is an equitable right and, therefore, should be considered a general intangible under the Nebraska Uniform Commercial Code § 9-106. And, as a result, they are entitled to the termination payment since they had a perfected security interest in the general intangibles.

By contrast, the debtors-in-possession argued that the landlord's payment was not a general intangible and that the creditors failed to perfect their interest in the lease pursuant to Nebraska statutes concerning the perfection of real property

interests. In addition, the debtors-in-possession contended that even if the plaintiffs were properly perfected at one time, they failed to remain perfected by failing to file the proper financing statements in the State of Mexico.

DISCUSSION

Under Bankruptcy Rule 8013, this Court is bound by the clearly erroneous standard in reviewing findings of fact by the Bankruptcy Court. In re Hunter, 771 F.2d 1126 (8th Cir. 1985). "Findings of fact shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the bankruptcy court to judge the credibility of the witnesses." Bankr. Rule 8013. Conclusions of law are subject to de novo review.

The Court does not find the argument of the creditors persuasive that the term "general intangible" in the financing documents signed by the debtors-in-possession encompasses the payment from the landlord in consideration of the defendant giving up any further interest or right in the real property lease.

The Bankruptcy Court was correct in reasoning that in order to perfect an interest in a lease it must be in writing and properly recorded with the Register of Deeds. Neb. Rev. Stat. §§ 76-211 and 76-238 (appropriate place to record interest in lease is Register of Deeds in a county in which the real estate is located). Grand Island Hotel Corporation v. Second Island Development Co., 191 Neb. 98, 214 N.W.2d 253 (1974). Article 9 of the Uniform Commercial Code as adopted in Nebraska specifically provides:

[Article 9 does not apply] to the creation or transfer of an interest in or a lien on real estate, including a lease or rents thereunder.

Neb. Rev. Stat. U.C.C. § 9-104(j).

In this instance, the lease was not recorded. After the bankruptcy petition was filed, the debtors-in-possession had the powers of a trustee that, in turn, enjoys the position of a hypothetical lien creditor. 11 U.S.C. §§ 544 and 1107. An unrecorded interest in real property is not valid against the hypothetical lien creditor, in this case, the debtors-in-possession. The Bankruptcy Court did not error in holding the creditors failed to properly perfect any interest they may have had in the lease or its proceeds.

The creditors argue that the term "general intangible" in the security agreement and financing statement signed by the defendants, encompasses the payment from the lessor in consideration of the creditors giving up any further interest or right in the real property. The Court finds that the Bankruptcy Court did not err in holding that such right was not a general intangible under state law since the Bankruptcy Code, not state law, conferred the right to assume a lease and cure a default or to negotiate for payment in consideration of giving up possession of the leasehold. 11 U.S.C. § 365. The creditors failed to provide any persuasive case law or other authority for their position.

In any event, as the Bankruptcy Court noted, assuming the funds at issue were subject to the creditors' security interest, the perfection lapsed in February, 1984. Any perfected security interest in general intangibles lapsed four months after the debtors-in-possession moved the business or its executive headquarters from Nebraska to New Mexico. Neb. Rev. Stat. U.C.C. § 9-103(3)(e) (security interest remains perfected four months after change of debtor's location to another jurisdiction).

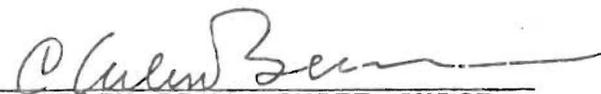
After a consideration of the record, the issues raised on appeal and the briefs, the Court finds that the decision of the Bankruptcy Court should be affirmed.

Accordingly,

IT IS ORDERED that the decision of the Bankruptcy Court should be and hereby is affirmed.

DATED this 12th day of August, 1986.

BY THE COURT:



C. ARLEN BEAM, CHIEF JUDGE
UNITED STATES DISTRICT COURT