

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF NEBRASKA

IN THE MATTER OF:)	
)	
DAMROW CATTLE COMPANY, INC.,)	
)	CASE NO. BK01-80266
Debtor(s).)	A02-8129
<u>JAMES J. STUMPF, Chapter 7 Trustee,</u>)	
)	
Plaintiff,)	CH. 7
)	
vs.)	
)	
DOUBLE S LAND & CATTLE CO., LLC,)	
and FIRST NATIONAL BANK OF OMAHA,)	
)	
Defendants.)	

ORDER

This matter is before the court on cross-motions for summary judgment by Double S Land & Cattle Co., LLC (Fil. #186) and First National Bank of Omaha (Fil. #248). Tim Engler, Robert V. Ginn, and Cary Kline represent Double S Land & Cattle Co., and John O'Brien and Alan Pedersen represent First National Bank of Omaha. Evidence and briefs were filed and, pursuant to the court's authority under Nebraska Rule of Bankruptcy Procedure 7056-1, the motions were taken under advisement without oral arguments.

These competing motions concern the movants' respective lien priorities in the proceeds of the sale of grain. Double S's motion for partial summary judgment requests a finding as to the existence and priority of its lien, but not the amount thereof. FNBO's motion for summary judgment requests a finding that its perfected Article 9 security interest is the superior interest in the proceeds.

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); Williams v. Marlar (In re Marlar), 267 F.3d 749, 755 (8th Cir. 2001). To properly perform that analysis, "the [c]ourt views the facts in a light most favorable to the nonmoving party and allows that party the benefit of all reasonable inferences to be drawn from that evidence." Prudential Ins. Co. v. Hinkel, 121 F.3d 364, 366 (8th Cir. 1997), cert. denied sub nom. Hinkel v. Hinkel, 522 U.S. 1048 (1998). 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. 317, 325 (1986). In making that determination, the court looks "to the substantive law to determine whether an element is essential to a case, and [o]nly disputes over facts that might affect the outcome of the suit under the governing law will properly preclude the entry of summary judgment." Dulany v. Carnahan, 132 F.3d 1234, 1237 (8th Cir. 1997) (quoting Anderson v. Liberty

Lobby, Inc., 477 U.S. 242, 248 (1986)).

The parties agree on the following facts:

1. Defendant First National Bank of Omaha (“FNBO”) is a national banking association with its principal place of business in Nebraska.
2. On or about April 14, 2000, Damrow Cattle Company executed and delivered to FNBO two promissory notes, each for \$4,000,000.
3. To secure those notes, Damrow Cattle Company gave FNBO a security interest in its personal property, including inventory, accounts, general intangibles, equipment, and farm products. FNBO filed the necessary financing statements to perfect its security interest.
4. As of November 30, 2007, the unpaid balance of those notes exceeded \$2,000,000.
5. FNBO’s collateral includes the proceeds of the sale of the corn at issue here.
6. Defendant Double S Land & Cattle Co., LLC (“Double S”), is a Nebraska limited liability company with its principal place of business in Holdrege, Phelps County, Nebraska. William Sandy, M.D., is the sole member and manager of Double S.
7. Double S purchased a 160-acre feedlot from Damrow Cattle Company in July 2000. Double S leased the property back to Damrow Cattle Company for monthly rent of approximately \$22,000. The rent was calculated at \$.05 per head per day, using the maximum feedlot capacity of 14,500 head.
8. The leased premises included cattle pens for approximately 14,500 head, grain bins and grain-handling equipment, bunker silos, a feed mill, offices, hospital barn, two loading areas, a truck scale, a shop, a few smaller buildings, and approximately 35 acres of farm ground.
9. Damrow Cattle Company obtained high-moisture corn from area farmers to use as feed in the feedlot. The corn was delivered to the feedlot, where it was piled on the ground. Damrow Cattle Company employees compacted it and covered it with a tarp to protect it from the elements.
10. In January 2001, FNBO exercised its alleged rights under various security agreements and petitioned the Phelps County District Court for the appointment of a receiver for its collateral. On January 16, 2001, the Phelps County District Court appointed the sheriff of Phelps County as receiver in order to protect FNBO’s collateral. By order dated January 18, 2001, that court appointed Tom Morrow to serve as receiver of all of the collateral.

11. Damrow Cattle Company voluntarily relinquished possession of the premises to Double S on January 17, 2001.
12. On the date of Mr. Morrow's appointment as receiver, Damrow Cattle Company had approximately 10,600 head of cattle and 361,177 bushels of high-moisture corn at the Double S feedlot. The receiver caused approximately 136,177 bushels of the corn to be fed to the cattle before they were removed from the feedlot in April 2001. He billed the owners of the cattle for the corn at the price of \$1.7864 per bushel and collected \$243,166.85, which he turned over to FNBO. Approximately 225,000 bushels of high-moisture corn remained at the feedlot thereafter and was surrendered to the bankruptcy trustee on or about November 9, 2001.
13. On February 1, 2001, an involuntary Chapter 7 bankruptcy petition was filed against Damrow Cattle Company, Inc. ("the debtor").
14. The pile of high-moisture corn was property of the Damrow Cattle Company's bankruptcy estate.
15. On February 20, 2001, FNBO obtained relief from the automatic stay regarding some of its collateral. That order also authorized Mr. Morrow to continue as custodian of the bankruptcy estate and excused him from turning over property of the estate.
16. On April 12, 2001, the Phelps County District Court ordered the receiver to vacate Double S's property by April 30, 2001.
17. On or about April 19, 2001, plaintiff James J. Stumpf was duly appointed trustee for the Chapter 7 estate of Damrow Cattle Company, Inc.
18. In the summer of 2001, Heartland Feeders leased the Double S feedlot. Heartland submitted a bid of \$1.02 per bushel for the high-moisture corn, but the receiver did not accept the bid.
19. The receiver found another buyer for the high-moisture corn, but Dr. Sandy refused to relinquish possession of the corn because he wanted to protect his possessory lien.
20. On or about November 9, 2001, at the request of Double S and others, this court vacated its February 20, 2001, order excusing turnover and directed that the state court receiver cease administration of property of the bankruptcy estate and turn over to the bankruptcy trustee the high-moisture corn located at the Double S feedlot. The trustee was ordered to sell the corn and to hold the proceeds thereof pending further order of the court.
21. In February 2002, the trustee sold the corn to Platte Valley Cattle Company, LLC, for \$191,738.04. Sale expenses were deducted, and the remaining proceeds were deposited in the court's registry. The balance is approximately \$160,000.

22. Double S filed a proof of claim in the underlying bankruptcy case for an unsecured, non-priority claim in the amount of \$1,001,000 for breach of the lease, damage to the property, additional expenses to recover cattle owned by an entity in which Dr. Sandy had an interest from the feedlot after the receiver was appointed, feed overcharges, and damages resulting from the debtor's fraud.
23. Double S also filed an administrative expense claim for \$66,000 in rent for the period during which the receiver operated the feedlot (January 18, 2001, to April 30, 2001), and \$40,000 to clean up the feedlot after the receiver vacated the premises. Double S and the Chapter 7 trustee reached a compromise on this claim, and Double S was paid \$66,000.

The following facts regarding the high-moisture corn pile were established at trial in the related adversary proceeding of Skane, Inc. v. First Nat'l Bank of Omaha, Adv. Proc. No. A01-8056, as set forth in the memorandum opinion of October 7, 2003 (Fil. #305):

1. Unlike dry corn, there is no significant resale market for high-moisture corn because once it gets "put up" and compacted, it must be fed fairly quickly after it is removed from the pile or it will lose its feed qualities.
2. Damrow Cattle's promissory notes, security agreements, and financing statements with FNBO gave the bank a perfected lien on all corn which Damrow Cattle then owned and thereafter acquired rights in.
3. FNBO filed an Effective Financing Statement with the Nebraska Secretary of State on April 18, 2000, evidencing a security interest in Damrow Cattle's corn, among other farm products.

Double S asserts that it holds a lien on the corn proceeds for "services performed upon personal property" pursuant to Neb. Rev. Stat. § 52-601.01¹ under an implied contract or an involuntary bailment. It argues that it was forced to "exert care or diligence" to protect the corn remaining at the feedlot after the receiver vacated the premises on April 30, 2001. Double S makes clear that it is not asserting a landlord's lien and is seeking a lien only to compensate it for services rendered. The dispute between Double S and FNBO arises over which entity's lien has priority.

¹§ 52-601.01. Services performed upon personal property; disposition of property; when; notice.

A person who shall perform work or labor, or exert care or diligence, or who shall advance money or material upon personal property under a contract, expressed or implied, and who holds such property for a period of ninety days, may dispose of the property by sale or other manner. Such disposition shall not occur until thirty days after the mailing of a written notice of the intended disposition by certified mail, return receipt requested, to the last-known address of the owner of the personal property to be disposed of, and to any lien or security interest holder of record.

Double S takes the position that under Neb. U.C.C. § 9-310², its statutory lien takes priority over FNBO's perfected security interest.

FNBO argues that U.C.C. § 9-310 is inapplicable because Double S is not in the business of furnishing services to protect another entity's personal property. That argument was successfully made by the lender in U.S. Nat'l Bank v. Atlas Auto Body, Inc., 335 N.W.2d 288 (Neb. 1983), where an automobile repair company had a possessory artisan's lien in an automobile in which U.S. National Bank held a perfected purchase-money security interest. The repair company asked for payment of the repair costs and storage fees for maintaining possession of the vehicle, and asserted that the total amount constituted a lien with priority over the bank's lien pursuant to U.C.C. § 9-310. The auto repair company's lien arose under Neb. Rev. Stat. § 52-201, which provided that any person who "repairs or in any way enhances the value of any . . . automobile . . . shall have a lien on such . . . automobile . . . while in his possession, for his reasonable or agreed charges for the work done or material furnished"

The court agreed that the artisan's lien was a prior lien. However, the court did not permit the storage charges to be included under § 9-310 because the auto repair company was not "in the business" of storing vehicles.

In order for Atlas to retain its possessory lien under § 52-201, it is required by law to maintain possession of the vehicle, thereby storing the vehicle until it determines to foreclose on said vehicle. This did nothing to "enhance" the value of the vehicle, as contemplated by § 52-201. It would be inconsistent to grant, on the one hand, the artisan a possessory lien necessary in order to gain superior rights over all other lienholders and then permit the artisan to likewise maintain a lien for storage charges, absent some showing that the artisan was regularly in the business of storing vehicles.

335 N.W.2d at 292.

The Atlas court's decision in this regard was premised on the statutory language creating the lien, which required an enhancement of value. In contrast, the plain language of the statute creating a lien for services performed on personal property does not require the lienholder to have enhanced the value of the property. Rather, it requires only that Double S "exert care or diligence" over the

²Because the events at issue here occurred prior to the effective date of Revised Article 9, the previous version of that section is applicable.

§ 9-310. Priority of certain liens arising by operation of law.

When a person in the ordinary course of his business furnishes services or materials with respect to goods subject to a security interest, a lien upon goods in the possession of such person given by statute or rule of law for such materials or services takes priority over a perfected security interest unless the lien is statutory and the statute expressly provides otherwise.

property. The corn was in the custody of either the receiver or the trustee from January 16, 2001, until the corn was sold, although it remained in Double S's possession during that time. The possession was not adjunct to the performance of any work or service. Rather, the possession was the exertion of care over the property, which Double S argues constitutes sufficient "service" to entitle it to a lien.

There is very little case law interpreting Neb. Rev. Stat. § 52-601.01 or its predecessor, § 52-601. It is unclear when or why the "exert care or diligence" language was introduced into the Nebraska statute, but it has been there since at least the 1923 version of § 52-601, according to state records. See Act approved Apr. 12, 1923, ch. 118, 1923 Neb. Laws 280. An amendment passed in 1972 specifically included thirty days of storage charges in the lien, Neb. Leg. J., 82nd Leg., 2d Sess. 1091 (Mar. 7, 1972), but that language disappeared by the time the statute was amended in 1974. The 1974 version streamlined the sale procedures and disposition of the sale proceeds. Neb. Leg. J., 83rd Leg., 2d Sess. 1174-75 (Mar. 19, 1974) and 1621-22 (Apr. 10, 1974). Amendments in 1994 resulted in the statute's present form. The focus of the introducer's statements and committee hearings in 1974 was on protecting small businesses such as jewelers and electronics repair shops which repair items for customers who then do not return to pay for and reclaim the item. Hearing on L.B. 960 Before the Comm. on Constitutional Revision and Recreation, 83rd Leg., 2d Sess. 23-29 (Neb. Feb. 15, 1974).

While FNBO argues that other types of statutory or common-law liens may be applicable, such as a landlord's lien or an agricultural product lien, Double S points out that it is claiming none of those and was not Damrow's landlord after January 17, 2001, when Damrow voluntarily relinquished the premises and the receiver was appointed. The argument that Double S was not acting as a landlord is an interesting one. Although the debtor surrendered the premises, the receiver was in control until ordered by the state district court to vacate. Double S was still the landlord, as evidenced by its request for and receipt of rent for the period Mr. Morrow was responsible for the feedlot. Therefore, the "care or diligence" was necessarily provided by Double S in the ordinary course of its business as a landlord. That does not give rise to priority under Neb. U.C.C. § 9-310, however, because § 9-310 applies to possessory liens held by persons who performed work on the collateral in the ordinary course of their business, such as artisans' liens. See Official Comment to Neb. U.C.C. § 9-310, at ¶ 1, describing the section's purpose: to give priority to "liens securing claims arising from *work intended to enhance or preserve* the value of the collateral" (emphasis added). Here, the feedlot operator was in the business of storing corn, but Double S was not. Double S also admits it performed no work to enhance or preserve the value of the collateral. Rather, in the role of landlord, it prevented others from trespassing onto its property and taking the corn. This protection of the collateral was done of Double S's own accord, however, as the bankruptcy trustee was in control of the assets and did not request Double S's assistance. Therefore, regardless of whether Double S holds a valid lien under Neb. Rev. Stat. § 52-601.01, it cannot take priority over FNBO's perfected security interest.

IT IS ORDERED Double S Land & Cattle Co., LLC's motion for partial summary judgment (Fil. #186) is denied. First National Bank of Omaha's motion for summary judgment (Fil. #248) is granted. Separate judgment will be entered.

DATED: April 15, 2008

BY THE COURT:

Timothy J. Mahoney
Chief Judge

Notice given by the Court to:

*John O'Brien
Alan Pedersen
*Tim Engler
Robert V. Ginn
*Cary Kline
U.S. Trustee

Movant (*) is responsible for giving notice to other parties if required by rule or statute.