

UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF NEBRASKA

IN THE MATTER OF)	
)	
KENNETH & IRENE PIPER,)	CASE NO. BK92-41622
)	
DEBTOR)	A93-4001
)	
NEHAWKA FARMERS COOPERATIVE,)	
Nehawka, Nebraska,)	
)	CH. 12
Plaintiff)	
vs.)	
)	
KENNETH & IRENE PIPER, Debtors,)	
FIRST NATIONAL BANK OF JOHNSON,)	
CLARK GRAIN CO.,)	
)	
Defendant)	

MEMORANDUM

Hearing was held on August 9, 1993. Appearing on behalf of debtors was David Hahn of Hahn Law Office, Lincoln, Nebraska. Appearing on behalf of First National Bank of Johnson was John Ballew of Baylor, Evnen, Curtiss, Gritmit & Witt, Lincoln, Nebraska. Appearing on behalf of Heinke and Clark Grain Co. was Richard Hoch of Hoch & Steinheider, Nebraska City, Nebraska. Appearing on behalf of John Deere Co. was Michael Whaley of Gross & Welch, Omaha, Nebraska. Appearing on behalf of Nehawka Farmers Cooperative was Rocky Weber of Crosby, Guenzel, Davis, Kessner & Kuester, Lincoln, Nebraska. Appearing as trustee was Richard Lydick of Omaha, Nebraska. This memorandum contains findings of fact and conclusions of law required by Fed. Bankr. R. 7052 and Fed. R. Civ. P. 52. This is a core proceeding as defined by 28 U.S.C. § 157(b)(2)(K).

Background

The Plaintiff, Nehawka Farmers Cooperative (Nehawka), entered into an agreement with the debtors, Kenneth K. and Irene R. Piper, to provide feed, services, and medication for debtors' hog operation near Dunbar, Nebraska. The agreement was made on

or about February 22, 1992, and ended on or about September 30, 1992. To secure payment of the debt owed by the debtors, Nehawka took a Uniform Commercial Code security interest in all hogs, including boars, sows, market hogs, and pigs, as set forth in the security agreement that was perfected by filing in Otoe County, Nebraska, on March 30, 1992.

The debtors filed a petition for relief under Chapter 12 of the Bankruptcy Code on October 21, 1992. At that time, the balance due on the loan from Nehawka was \$55,131.92. On January 6, 1993, Nehawka commenced this adversary proceeding to determine its rights and priorities in said collateral.

Two other creditors have claimed a security interest in the hogs and the proceeds from them. The first claim holder is the First National Bank of Johnson (First National). The parties involved in this adversary proceeding have determined that First National holds the first lien in the debtors' hogs and proceeds based upon the security agreement and financing statement filed in Otoe County on July 31, 1991. The senior lien position of First National has been settled and is not in dispute.

The remaining issue is the existence of a perfected lien in favor of Clark Grain Company. Clark Grain Company (Clark Grain) filed a feed lien against the debtors pursuant to Neb. Rev. Stat. § 54-208 (Reissue 1988) on January 8, 1992, obviously prior to the U.C.C. filing on March 30, 1992, by Nehawka. The Notice of Lien provided that the amount of the debt was \$23,500.00 and that the last date upon which goods or services would be supplied under the contract was January 4, 1992. Clark Grain commenced delivering feed to the debtors on November 1, 1991. By January 8, 1992, the account balance was \$18,031.76. After January 8 and until February 28, 1992, the debtors purchased an additional \$13,666.58 worth of feed. Purchases of feed plus interest incurred on the account totaled \$32,007.47. However, due to payments made by the debtors to Clark Grain, the amount outstanding on the date the bankruptcy case was filed was \$9,228.38.

Nehawka requests that this Court determine whether it holds a second lien behind First National and before Clark Grain, or whether it holds a third lien behind Clark Grain in the collateral. Clark Grain argues that its prior perfected lien extended beyond the \$23,500.00 and the January 4th delivery date stated in the lien notice to secure future advances in feed made after January 4, 1992. Nehawka, on the other hand, argues that the January 4, 1992, date cut off the lien, and the lien securing the debt was extinguished when the debtors paid Clark Grain for the feed that was delivered prior to January 4, 1992, thereby

causing Nehawka's March 30, 1992, perfected security interest to take priority over any lien of Clark Grain.

Issue

The issue to be determined by this Court is whether the lien notice filed by Clark Grain solely covered purchases made before January 4, 1992, or whether the lien notice granted a lien in the hogs for purchases made by the debtors after January 4, 1992.

DECISION

Clark Grain's perfected statutory lien in the hogs was a lien securing only the cost of supplies delivered as of January 4, 1992. It did not provide for future advances. Because the statutory lien was not re-perfected to cover the deliveries after January 4 through February 28, 1992, Clark Grain's lien in these purchases is unperfected and is inferior to the security position of Nehawka.

Discussion

Clark Grain filed a Notice of Lien on January 8, 1992. Nehawka filed a U.C.C. financing statement on March 30, 1992. It is apparent that Clark Grain filed first in time. If Clark Grain had perfected its lien under Article 9 of the Uniform Commercial Code and if its security documents had a future advance clause, it would have a continuing lien prior to Nehawka. U.C.C. § 9-312(5) and (7). However, liens granted by Neb. Rev. Stat. § 54-208 (Reissue 1988) are not subject to the perfection or priority scheme of Article 9 of the Uniform Commercial Code.

Section 54-208 was created to provide protection to those persons who delivered feed for livestock. The applicable portions of the section are as follows:

When any person ... contracts or agrees with another to deliver any feed or feed ingredients for any kind of livestock, the person ... shall have a lien upon such livestock for the feed or feed ingredients and related delivery costs, which shall be a first, paramount, and prior lien if the holders of any prior liens have agreed in writing to the contract for the feed or feed ingredients and related delivery costs.... Such person ... shall file notice in the office of the county clerk of the county in which such livestock are located. Such notice of lien shall designate:
... (3) The amount due for such feed or feed

ingredients covered by the lien; ... and (6) The last date on which such feed or feed ingredients were delivered. Such lien shall attach and have priority as of the date of the filing if filed in the manner provided in this section and may be foreclosed in the manner and form provided for the foreclosure of secured transactions in Article 9 of the Uniform Commercial Code. (emphasis added)

Neb. Rev. Stat. § 54-208 (Reissue 1988).

Nebraska case law has not addressed section 54-208; therefore, this Court must interpret the section without direct guidance from the Nebraska Supreme Court.

Clark Grain urges this Court to adopt the view that section 54-208 is a continuing lien under U.C.C. § 9-312(7) and is valid until formally terminated by Clark Grain under Neb. Rev. Stat. §54-209 (Reissue 1988). The Court does not accept the construction asserted by Clark Grain. First, if the Nebraska legislature intended section 54-208 to follow Article 9, it could have placed the section in Article 9. Second, the legislature could have applied Article 9 to all of section 54-208, rather than limiting Article 9 application to foreclosure procedures and fee charges. Finally, U.C.C. § 9-310 refers to the existence of a separate statutory mechanism for obtaining a lien with priority over Article 9 perfected security interests. In that section, the U.C.C. specifically acknowledges that a parallel statutory system exists that is not incorporated into the U.C.C. system, unless the separate statute provides for such incorporation.

Since section 54-208 creates a statutory lien, the question to be answered is whether the section permits Clark Grain to continue a lien in debtors' property after receiving full payment of the amount due as stated in the Notice of Lien. The plain language of the statute, along with the language of the Notice of Lien, convinces this Court that Clark Grain had a perfected lien only to the extent of the value of the deliveries made up to January 4, 1992.

The statute requires that the creditor list the "last date" upon which deliveries were made to the debtors. Neb. Rev. Stat. § 54-208(6). Likewise, the Notice of Lien filed by Clark Grain Co. states January 4, 1992 as the "**LAST DATE** (Upon which goods or services supplied under contract)". To give effect to this clause in the statute and to the date placed in the Notice of Lien, "last date" must mean the last date of feed deliveries which would be covered by the underlying contract. Clark Grain

could have filed a new Notice of Lien to perfect deliveries made after January 4 or could have listed February 28, 1992, as the date of the last delivery of feed under the contract. By doing so, Clark Grain would have complied with the specific requirements of the statute for obtaining priority status.

To perfect a continuing lien under Article 9 of the U.C.C., certain requirements must be met. Among the sections of Article 9 which do not apply to statutory liens created under section 54-208 are Neb. U.C.C. sections 9-203(1)(a) (requiring a signed security agreement), and 9-402(a) (stating the requirements of a valid financing statement, including the signature of both the debtor and the creditor). Since the purpose of section 54-208 is to grant an automatic lien without complying with these sections, this Court is convinced that the Nebraska legislature did not intend for the statutory lien obtained without written consent of the debtors to provide the lienholder the benefit of the priority of future advances which a U.C.C. lienholder can obtain by filing the proper documents. Thus, the statutory lien does not extend to amounts due for deliveries beyond the "last date" stated in the Notice of Lien. If the statute is interpreted otherwise, a second creditor, such as Nehawka, would be placed in a position where it could not determine from the Notice of Lien the actual dollar amount secured by the lien and the second creditor would be required to assume the applicability of U.C.C. § 9-312(7) without any reference by the legislature to the applicability of that U.C.C. section to 52-208.

Clark Grain argues that a subsequent creditor is not necessarily at the mercy of the section 54-208 lien holder because section 54-209 requires that the feed lien holder file a termination statement when the lien has been satisfied, and the termination statement records notice to a subsequent creditor that the lien is satisfied. However, it appears that the purpose of section 54-209 is to put the world on notice that the lien, which covered the amount due on the final delivery date, has been paid. In this case, Clark Grain should have filed a termination statement once the debtors paid an amount sufficient to satisfy the amount due for feed delivered up to January 4, 1992. If it had a claim to additional funds, a new Notice of Lien should have been filed.

In conclusion, the Nehawka Farmers Cooperative's security interest in the hog collateral of the debtors is second in priority behind the First National Bank of Johnson by virtue of the determination that Clark Grain Company did not file a second Notice of Lien to cover deliveries of feed made to the debtors after January 4, 1992. After Nehawka filed its financing statement on March 30, 1992, Clark Grain needed the written

permission of Nehawka to have a prior lien in the hog collateral. Since Clark Grain did not obtain such permission, Nehawka's lien is superior to the lien of Clark Grain.

Separate journal entry to be entered.

DATED: November 18, 1993.

BY THE COURT:

/s/ Timothy J. Mahoney
Timothy J. Mahoney
Chief Judge

CC: Movant, Debtor(s) Atty. and all parties appearing at hearing
[] Chapter 13 Trustee [] Chapter 12 Trustee [] U.S.Trustee

Movant is responsible for giving notice of this journal entry to any parties in interest not listed above.

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KENNETH & IRENE PIPER,)
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DEBTOR(S))
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NEHAWKA FARMERS COOPERATIVE,)
Nehawka, Nebraska,)
Plaintiff(s))
vs.)
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KENNETH & IRENE PIPER, Debtors))
FIRST NATIONAL BANK OF)
JOHNSON, CLARK GRAIN CO.,)
)
Defendant(s))
_____)

CASE NO. BK92-41622
A93-4001

CH. 12

Filing No.

JOURNAL ENTRY

DATE: November 18, 1993
HEARING DATE: August 9,
1993

Before a United States Bankruptcy Judge for the District of
Nebraska regarding Trial on Complaint to Determine Validity,
Priority, or Extent of a Lien or Other Interest in Property.

APPEARANCES

David Hahn, Attorney for debtors
John Ballew, Attorney for First Nat'l. Bank of Johnson
Richard Hoch, Attorney for Heinke and Clark Grain Co.
Michael Whaley, Attorney for John Deere Co.
Rocky Weber, Attorney for Nehawka Farmers Cooperative
Richard Lydick, Trustee

IT IS ORDERED:

The lien of Nehawka Farmers Cooperative in hogs or hay
proceeds has priority over the lien, if any, of Clark Grain
Company. See memorandum entered this date.

BY THE COURT:

/s/ Timothy J. Mahoney
Timothy J. Mahoney
Chief Judge

CC: Parties appearing at hearing