

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF NEBRASKA

IN THE MATTER OF:)
)
YAFFE PRINTING COMPANY,) CASE NO. BK97-81898
)
DEBTOR(S).) CH. 7

MEMORANDUM

Hearing was held on Trustee's Objection to Claims of Irvin Yaffe and Sol Yaffe. Appearances: Kathryn Derr for Trustee and Sam King for Sol Yaffe and Irvin Yaffe. 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)(B).

Background

In April of 1986, debtor Yaffe Printing Company, Inc., obtained a loan from N.S. Yaffe Printing Company and Yaffe Investment Company in the amount of \$684,000. The debtor executed in favor of the lenders a security agreement granting a security interest in personal property of the debtor, including machinery, equipment, furniture and fixtures both then owned and after acquired. On April 18, 1986, the lenders filed a financing statement with the Nebraska Secretary of State at filing no. 9986339992. The lenders subsequently filed a notice of assignment of the security interests to Sol Yaffe and Irvin Yaffe (the "Yaffes"). Five years after the filing date of the original financing statement, the financing statement lapsed pursuant to Neb. Rev. U.C.C. § 9-403(2).

On March 18, 1997, the Yaffes filed a continuation statement of the lapsed original financing statement. The continuation statement bore the address of the debtor; the Yaffes' signatures as secured parties; the Yaffes' addresses as Omaha, Nebraska 68131; and the original financing statement filing number. Approximately four months later, on July 25, 1997, the debtor filed its voluntary petition for relief under chapter 7 of the Bankruptcy Code.

One hundred seventy thousand dollars, representing the proceeds of collateral subject to the security agreement, are now under the control of the chapter 7 trustee, including \$67,500 from the sale of two Heidelberg presses, \$2,000 from

the sale of two Color Chief offset presses, and \$100,500 from the sale of the debtor's remaining machinery, equipment, and fixtures.

The Dispute

The Yaffes maintain that they have a perfected security interest in all of the above described personal property and proceeds therefrom by virtue of the continuation statement filed in March of 1997, and have requested the court to grant the Yaffes an allowed secured claim in the amount of \$170,000. The Yaffes contend that, pursuant to Neb. Rev. U.C.C. § 9-402(2)(c), the continuation statement operated from the date of its filing forward as a re-perfection of the lapsed financing statement.

The chapter 7 trustee maintains that the continuation statement does not comply with either Neb. Rev. U.C.C. § 9-402(1) or § 9-402(2) because the statement 1) failed to contain a complete address for the Yaffes from which information could be obtained regarding the security interest, 2) did not contain a description of the collateral, 3) failed to contain the social security numbers and/or federal tax identification numbers for both the debtor and the Yaffes as required by § 9-402(1), and 4) failed to explain why it was filed with the signature of the secured parties rather than that of the debtor. The chapter 7 trustee also argues that allowing the continuation statement to re-perfect the Yaffes' interest would frustrate the very purpose of Article 9 and the reliance others place on the perfection of security interests and notice thereof.

Discussion

Prior to July 1, 1999, the effective date of an amendment to the perfection statute, the formal requisites of financing statements and substantial compliance therewith were governed in relevant part by the following provisions of Neb. Rev. U.C.C. § 9-402:

(1) A financing statement may be in a form prescribed by the Secretary of State and is sufficient if it gives the names of the debtor and the secured party, is signed by the debtor, gives an address of the secured party from which information concerning the security interest may

be obtained, gives a mailing address of the debtor and contains a statement indicating the types, or describing the items, of collateral. The Secretary of State shall require that the social security number or the federal tax identification number of both the secured party and the debtor be provided on the financing statement and other related filings. . . . A copy of the security agreement is sufficient as a financing statement if it contains the above information and is signed by the debtor.

(2) A financing statement which otherwise complies with subsection (1) is sufficient when it is signed by the secured party instead of the debtor when it is filed to perfect a security interest in

. . .

(c) collateral as to which the filing has lapsed
. . . .

(8) A financing statement substantially complying with the requirements of this section is effective even though it contains minor errors which are not seriously misleading. The failure to include the social security number or the federal tax identification number shall not render any filing unperfected.

Neb. Rev. U.C.C. § 9-402(1), (2)(c), (8) (Reissue 1992).

Continuation statements, which serve to continue the filing of an already perfected security interest, are governed by Neb. Rev. U.C.C. § 9-403, which provides in relevant part that: "Any such continuation statement must be signed by the secured party, identify the original statement by file number, and state that the original statement is still effective." Neb. Rev. U.C.C. § 9-403(3).

Although the Yaffes filed a document denominated as a "continuation statement," they clearly did not file the document prior to the lapse of the original financing statement as required by § 9-403(3). However, the Yaffes do not contend that the statement "continued" the original filing

statement in the ordinary sense of the word. Instead, the Yaffes contend that the continuation statement operated to re-perfect their security interest as of that date forward because it fulfilled the notice provisions of the Article 9 filing system by substantially complying with § 9-402.

The chapter 7 trustee argues that the document filed by the Yaffes was in fact a continuation statement, albeit an invalid one, and cannot be permitted to operate as a financing statement and re-perfect the Yaffes' interest. Recent Nebraska case law does not support this position. While the bankruptcy trustee has the rights of a hypothetical lien creditor under 11 U.S.C. § 544(a)(1) as of the date of the filing date of the petition, those rights are determined according to state law. Jones v. Small Business Admin. (In re Cohutta Mills, Inc.), 108 B.R. 815, 817 (N.D.Ga.1989). See also Grogan v. Garner, 498 U.S. 279, 283, 111 S.Ct. 654, 657 (1991) (stating that the validity of a creditor's claim is determined by rules of state law).

In 1998, the Nebraska Supreme Court considered the primary purpose of financing statements while deciding whether the substantial compliance provisions of § 9-402(8) applied to § 9-403 in Brams Limited v. Elf Enterprises, Inc., 253 Neb. 932, 573 N.W.2d 139 (Neb. 1998). In Brams, the court determined that a continuation statement which had been filed without the required written assignment attached, nonetheless substantially complied with the requirements of § 9-403. The court reasoned that "a continuation statement serves the same purpose as a financing statement because it places potential creditors on notice that another creditor might have an interest in the collateral and contemplates that the potential creditor will make further inquiries into the matter." Brams, 253 Neb. at 936 (citing F.D.I.C. v. Victory Lanes, 158 B.R. 617 (E.D. Va. 1993)). The court emphasized that the purpose of the Article 9 filing system was to provide notice and reiterated its rejection of a strict statutory construction of § 9-402. Brams, 253 Neb. at 936 (citing Mid-Amer. Dairymen, Inc. v. Newman Grove Coop. Creamery Co., Inc., 191 Neb. 74 (Neb. 1974)).

In view of the fact that the purpose of the Article 9 filing system is to put prospective creditors on notice that a party may have a secured interest in the collateral, the court reasoned that the relevant inquiry becomes one of "whether or not a "reasonably diligent researcher" would be misled by

the irregularity.' " Brams, 253 Neb. at 937 (quoting Victory Lanes, 158 B.R. at 622).

Measured against that standard, it is clear for the following reasons, that the continuation statement did substantially comply, and that a "reasonably diligent researcher" would in fact not be misled by the irregularities in the Yaffes' statement.

First, although the Yaffes' statement failed to include the social security numbers and/or federal tax identification numbers for both the debtor and the Yaffes as required by § 9-402(1), § 9-402(8) expressly states that such omission does not render a filing unperfected.

Second, while the statement does not contain a description of the collateral subject to the security interest, the statement did include the filing number of the original financing statement. The filing number of the original financing statement provides sufficient information to inquire into the collateral. This is implicit in the text of § 9-403(3) which clearly indicates that inclusion of the original filing number provides sufficient information for a prospective creditor to ascertain what collateral may be subject to a security interest. A number have courts have even concluded that the inclusion of the correct original filing number is not necessarily required as long as the statement contains sufficient information to lead a researcher back to the original financing statement. See, e.g., Worthen Bank & Trust Co. v. Hilyard Drilling Co. (In re Hilyard Drilling Co), 840 F.2d 596 (8th Cir.1988) (implying that it is sufficient if a continuation statement provides the necessary linkage to the original financing statement so that it serves the notice purpose of Article 9); In re Adam, 96 B.R. 249 (Bankr.D.N.D.1989) (listing cases which hold that, as regards the collateral, a continuation statement must only provide sufficient information to link back to the original financing statement).

The inclusion by the Yaffes of the original filing number clearly provided the information necessary to allow a prospective creditor to ascertain what collateral might be subject to a security interest, despite the lack of a description of the collateral in the Yaffes' continuation statement.

Third, although the Yaffes did not provide a complete address at which they could be contacted, this did not render the continuation statement ineffective. A financing statement giving the listing of an incomplete address for a debtor will ordinarily constitute substantial compliance with the filing requirements. Hilburn v. Southern Trailer Distributors, Inc. (In re Smith), 508 F.2d 1323 (5th Cir. 1975). In some cases, courts have even concluded that financing statements which failed to include any of the required addresses, nonetheless substantially complied with the U.C.C. filing requirements. See, e.g., Rooney v. Mason, 394 F.2d 250 (10 Cir. 1968) (concluding that omitted addresses were readily available through telephone directory); In re French, 317 F.Supp. 1226 (E.D.Tenn.1970) (concluding that the failure to include addresses in financing statement did not result in prejudice to interest of general creditors).

The Yaffes did include a partial address, which informed prospective creditors that the Yaffes resided in Omaha, Nebraska, in the zip code area 68131. This information conforms with the complete address listings for Sol Yaffe and Irvin Yaffe in the Omaha telephone directory.

Fourth, although the continuation statement did not provide an explanation regarding why the secured parties rather than the debtor had signed the continuation statement, such explanation is not expressly required by the text of § 9-402.

The trustee's argument that allowing the continuation statement to re-perfect the Yaffes' interest would frustrate the very purpose of Article 9 is simply in error. The Nebraska Supreme Court has expressed the view that the primary purpose of the Article 9 filing system is notice. The Yaffes introduced affidavit evidence that an attorney had occasion to conduct a U.C.C. search on the Yaffe Printing Company in an attempt to ascertain any claims or liens which might be asserted against the property his client wished to purchase. The attorney immediately discovered the continuation statement relating to the original financing statement filed by the Yaffes. Because of the filing, the attorney contacted counsel for the Yaffes. In other words, the filing served the precise purpose for which it was intended: it provided a prospective creditor notice and information sufficient to allow further inquiry.

In view of the Nebraska Supreme Court's construction of the U.C.C. filing system, the continuation statement filed by the Yaffes on March 18, 1997, served to re-perfect their interests as of that date. As a result, the chapter 7 trustee's objection to the Yaffes' secured claim is overruled. The Yaffes are allowed a secured claim in the amount of \$170,000.00.

Separate journal entry to be entered.

DATED: August 3, 1999

BY THE COURT:

/s/Timothy J. Mahoney
Chief Judge

Copies faxed by the Court to:

19 KING, SAM
27 DERR, KATHRYN

Copies mailed by the Court to:

United States Trustee

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

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF NEBRASKA

IN THE MATTER OF:)
)
YAFFE PRINTING COMPANY,) CASE NO. BK97-81898
) A
DEBTOR(S).)
) CH. 7
) Filing No. 44, 45
Plaintiff(s))
vs.) JOURNAL ENTRY
)
)
)
Defendant(s)) DATE: August 3, 1999
HEARING DATE: May 27,
1999

Before a United States Bankruptcy Judge for the District of Nebraska regarding Trustee's Objection to Claims of Irvin Yaffe and Sol Yaffe (Claims 63, 67 & 68); Resistance by Sol Yaffe and Irvin Yaffe.

APPEARANCES

Kathryn Derr for Trustee
Sam King for Sol Yaffe and Irvin Yaffe

IT IS ORDERED:

The Chapter 7 Trustee's objection to Yaffes' secured claim is overruled. The Yaffes are allowed a secured claim in the amount of \$170,000.00. See memorandum entered this date.

BY THE COURT:

/s/Timothy J. Mahoney
Chief Judge

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