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John Cooper
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IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF UTAH

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Central Division

INDIAN SPRINGS FARM AND RANCH, :
 INC., :
 A Utah Corporation, :
 Bankrupt, : Bankruptcy No. B77-00062

RAY TWELVES, Trustee, :
 Plaintiff, :

vs. :

PRODUCTION CREDIT ASSOCIATION, :
 L & M ENTERPRISES, BROADHEAD :
 DISTRIBUTING COMPANY, JENKINS :
 SALES AND SERVICE, DAIRY :
 CAPITAL CORPORATION, and RIVER :
 BOTTOM EQUIPMENT LEASING, LTD., :
 Defendants. :

RIVER BOTTOM EQUIPMENT LEASING :
 CO., LTD., :
 A Utah Limited Partnership, :
 Bankrupt, : Bankruptcy No. B77-00063

W. STERLING MASON, JR., :
 Trustee, :
 Plaintiff, :

vs. : MEMORANDUM DECISION AND

PRODUCTION CREDIT ASSOCIATION, : ORDER
 L & M ENTERPRISES, and INDIAN :
 SPRINGS FARM AND RANCH, INC., :
 Defendants. :

In March, 1974, Utah Production Credit Association (PCA) made a loan to L & M Enterprises (L & M) secured by both real and personal property which was listed in the security agreement executed between the parties. A financing statement covering this agreement was filed with the Secretary of State

in April, 1974 as required under UTAH CODE ANN. §70A-9-402 (Supp. 1977) to perfect the lien. Subsequently, L & M sold property covered in the security agreement to Indian Springs Farm and Ranch, Inc. (Indian Springs). Documents dealing with this agreement were executed but never filed. Indian Springs then sold the property in question to River Bottom Equipment Leasing Co., Ltd. (River Bottom) in a sale and leaseback agreement. Some time after this transaction, in January of 1977, Bankrupts River Bottom and Indian Springs filed in bankruptcy. Just previous to these filings, Broadhead Distributing Company obtained a judgment against Indian Springs, and pursuant to that action, attached the property in question, storing it at Jenkins Sales and Services. Before execution could be made on the property so stored, Indian Springs filed bankruptcy and the trustee took possession.

In July of 1977, the Trustee for River Bottom filed a complaint to determine the validity of the claimed security interests in the property in his possession. PCA counterclaimed and crossclaimed seeking a determination that its security interest was perfected and prior to any other party's rights in the property and an order either releasing the property or the proceeds of its sale into PCA's hands. In March, 1978, a stipulation and an order were entered allowing the sale of the property in question free and clear of all liens, for not less than 80% of its appraised value. Any lien found to be valid would attach to the proceeds of the sale. Since this time, several items have accordingly been sold. In June of 1978, Jenkins Sales and Service filed a petition asking for the costs of storage and administration of the property.

Argument was heard on April 30, 1979 on the issue of the validity of PCA's lien over certain property found to be

in possession of the bankrupts at the time of filing. Counsel for Dairy Capital Corporation appeared to state that it claimed no interest in the property in question. The following stipulations were entered into in open court:

1. Proceeds from the sale of any property subject to the sale and leaseback agreement between River Bottom and Indian Springs which is adjudged to be free and clear of any lien will be divided equally between the two bankrupts, River Bottom and Indian Springs.

2. The Trustee will be paid \$2500 out of the present proceeds for administrative costs, this amount to be allocated according to the amount of property found to be covered by the PCA lien and the amount of property remaining with the Trustee.

A written stipulation was filed on May 9, 1979 settling the claims of Jenkins Sales and Service through May 30, 1979. Pursuant to the stipulation, Jenkins Sales and Service is to be paid \$5,656.45 out of the funds held by the Trustee, plus either ownership of the Gehl Model BF130 Silage Wagon (Item F on the Report of Appraiser), cash equal to the storage charge assessed against such item, or the proceeds from its sale, whichever is the lesser.

The threshold question arising is whether PCA's security interest, even if unperfected, takes precedence over the trustee's interest due to the fact that all creditors subsequent to PCA had actual notice of the PCA lien and specifically took subject to it. Under §70c of the Bankruptcy Act, 11 U.S.C. §110c (1976), it appears clear that whether or not all creditors had actual notice of a prior lien, the trustee is considered a lien creditor without notice. See 4B Collier on Bankruptcy ¶70.53 at 636 (14th Ed. 1978). Thus, the fact that all subsequent lien

creditors had actual notice of PCA's lien will not defeat the Trustee's priority unless PCA's lien was properly perfected under UTAH CODE ANN. §70A-9-402 (Supp. 1977) as to the items in question.

A financing statement concerning the PCA lien, properly executed and filed under UTAH CODE ANN. §70A-9-402 (Supp. 1977), gives the following description of the secured property: "All Crops" and "All Equipment." UTAH CODE ANN. §70A-9-402 (Supp. 1977) requires that the financing statement contain "a statement indicating the types, or describing the items, of collateral." This raises the issue of whether the secured property was sufficiently identified. Utah's enactment of the relevant U.C.C. provision, at UTAH CODE ANN. §70A-9-110 (1953), states that the identification is sufficient "whether or not it is specific if it reasonably identifies what is described." Construction of this standard has been very broad. The comments to U.C.C. §9-110 explain that the test is evidentiary and that a description is sufficient if it "makes possible" the identification of the thing described. This test of sufficiency has been interpreted by the U. S. Courts of Appeals for the Eighth¹, Second², Fifth³, and Ninth⁴ Circuits as "notice filing" which need only put the creditor on notice to inquire further to ascertain the exact property covered by the financing statement.⁵ The Utah Court has spoken only very briefly on this issue in Adams v. Nuffer, 550 P.2d 181 (1976), but it is apparent from its citation of the broad general standard that it would interpret its uniform statute consistent with this majority rule.⁶ The description in the financing statement before the Court, then, is sufficient to satisfy the identification requirement of UTAH CODE ANN. §70A-9-402 (Supp. 1977) if it "makes possible," upon reasonable inquiry, the specific identification of the equipment in question.

The perfection of a lien, of course, depends also upon the existence of a valid underlying security agreement. See 69 AM. JUR.2d Secured Transactions §290 at 123 (1973). The security agreement is often a primary means of specifically identifying collateral about which the financing statement has given general notice. Consistent with this view, some Courts have required that security agreement descriptions meet a somewhat stricter standard of specificity than the corresponding descriptions in the financing statement.⁷ In any event, the descriptions of the security agreement are typically an important part of the evidence by which the sufficiency of the financing statement is tested. To this evidence may be added surrounding facts which the inquiring creditor could discover with reasonable facility. In the instant case, persuasive testimony shows that the equipment in question was, at the time of the petition in bankruptcy when the trustee's rights arose, assembled almost entirely at one location where the precise number of pieces and description of equipment was readily available. Applying this evidence along with the descriptions in the security agreement, the Court finds that the financing statement at issue makes possible the identification of most of the equipment claimed as collateral.

Before argument was made to the Court, the parties stipulated in open court as to the validity or non-validity of the lien over some of the property in question. The following items were stipulated to as not being subject to the PCA lien. (All references to this property is made according to the lettering given it in the Report of the Appraiser, Plaintiff's Exhibit #1.):

1. Item A: 1 40' Fruehauf Flat Bed Trailer--

No s/n (left rear dual wheels missing - 1 right front dual missing - 1 left rear dual missing). It was also stipulated that this item was subject to the sale and leaseback agreement between the two bankrupts.

2. Item C: 1 1975 Ford 1/2T pickup - 6 cyl. - wheels missing - transmission missing - windshield shattered. It was also stipulated that this item was not subject to the sale and leaseback agreement between the two bankrupts.

3. Item D: 1 35' Loose Cargo Trailer with belt unloader. It was also stipulated that this item was not subject to the sale and leaseback agreement between the two bankrupts.

4. Item Y: 1 Kongkilde 24' Danish Spring Tooth Harrow s/n 01 057 011. It was also stipulated that this item was not subject to the sale and leaseback agreement between the two bankrupts.

5. Item FF: 1 Noble 12' Spring Tooth Harrow. It was also stipulated that this item was not subject to the sale and leaseback agreement between the two bankrupts.

The following items were stipulated to as being subject to a valid PCA lien:

1. Item E: 1 John Deere 2 Row Corn Harvester Attachment - s/n 0033801E.

2. Item F: 1 Gehl Model BF130 Silage Wagon - wheels missing s/n 5380. This item may go to Jenkins Sales and Service under the written stipulation heretofore mentioned in part satisfaction of its claim.

3. Item I: 1 14' Graham Hoehme Plow s/n 17747.

4. Item J: 1 John Deere 16 drop grain drill s/n 064081M.

5. Item L: 1 John Deere Model 4020 Tractor
- 1969 - very rough - s/n 201857R.

6. Item M: 1 John Deere Model 55 Self-
Propelled Combine - rear wheels missing w/ cab. S/n 88449H.

7. Item N: 1 John Deere Model 220T Baler
with PTO drive s/n 010735.

8. Item Q: 1 Propane Tank Weed Burner -
250 gal.

9. Item R: 1 John Deere Model 4020 Tractor
s/n 168393R.

10. Item CC: 4 Sections Drag Type Spike
Teeth Harrow - 6" sections.

11. Item GG: 1 John Deere Model 4620
Tractor (1971) s/n 011272R.

12. Item JJ: Loader (not listed on original
appraiser's report).

13. Item KK: Hoe Drill (not listed on original
appraiser's report).

The Trustee requested permission to abandon the
following items, which request was granted by the Court:

1. Item C: 1 1957 Ford 1/2T pickup - 6 cyl.
- wheels missing - transmission missing - windshield shattered.

2. Item Z: 79 2" Black Plastic Siphon Tubes.

3. Item AA: 2 1 1/2" Black Plastic Siphon
Tubes.

4. Item HH: 1 Crako 23 Channel CB Radio
s/n 595628.

5. Item II: 1 Pierce Simpson 'Lynx' 23
Channel CB Base Station s/n 522143.

As to the validity of the lien over the remaining

items, the Court makes the following determinations of fact:

1. Item G: 1 Vibra Tiller w/ PTO drive. No s/n. The Court finds a valid lien existing on this property in favor of PCA. Evidence being presented that the "Roto Tiller" listed in the security agreement was a generic, as well as trade, name for this piece of equipment, there being only one Roto Tiller of any kind among the equipment, and that piece of equipment being adequately identified by the claimant, this designation provides sufficient identification and notice under UTAH CODE ANN. §70A-9-110 (1953).

2. Items H and U: 1 John Deere Model 335 Sprayer with 35' boom - w/ 500 gal. tank s/n 000502N; 1 Home made 500 gallon Sprayer - booms missing - No s/n. The Court finds a valid PCA lien existing as to these items. Covered in the security agreement under the designation of "Used Misc Equipment," the Court finds this to provide adequate identification and notice to include equipment, such as this, which is similar to that specifically listed. See U.S. v. First National Bank, supra note 1, at 15.

3. Items B, K, and O: 1 Case 12' Windrower - engine missing - 1 front wheel missing s/n 8375644; 1 John Deere Model 224T twine tie Baler with PTO Drive - s/n 010755E; 1 John Deere Model 880 Windrower 12' - 1 rear wheel missing s/n 054467. As to these items, despite discrepancies in serial numbers as between the listing in the security agreement and the appraiser's report, the Court finds a valid PCA lien. The Utah Supreme Court, in encountering a discrepancy between serial numbers of this sort, held that this was insufficient to invalidate a financing statement. Adams v. Nuffer, supra. The problem of incorrect serial numbers has also been addressed by at least two other courts⁸, who found these errors to be inconsequential providing there existed

sufficient identification in the security agreement, other than the serial number, to provide notice to third parties. These results are in keeping with the comments to U.C.C. §9-110 which explicitly state that this section is meant to abolish the pre-Code requirement of serial number identification. It seems reasonable to conclude that if no serial number is required at all, then the fact that one is included, although incorrectly stated, should not defeat the sufficiency of the description if without the incorrect serial number, the description would have been adequate under the §9-110 standard. This section was intended to make easier the protection of secured parties, and therefore, the standard of sufficiency under UTAH CODE ANN. §70A-9-110 (1953), as interpreted in Adams v. Nuffer, supra, in accordance with the majority view, should and does clearly favor the secured party. In the present case, the security agreement identifies the model and make of these three items outside of the incorrect serial numbers, and, considering the circumstances in which they were found, there being only one Case Windrower, acquired from L & M, now or ever owned by Indian Springs, only one John Deere Windrower among the Indian Springs equipment, and only two John Deere Balers, two being listed in the security agreement and one having already been stipulated to as coming under the PCA lien, a third party should have been able, despite the serial number inconsistencies, to, upon reasonable inquiry, ascertain that this property was subject to the PCA lien.

4. Item P: 1 lot (400 approx.) assorted sizes Black Plastic Siphon Tubes. The Court finds no valid PCA lien to be covering these items. Although sufficiently described in the security agreement, the Court finds that they were not sufficiently identified by the lienor so as to enable it to reclaim the items. The testimony stated that although about

400 such siphon tubes were sold by L & M to Indian Springs, many have been replaced since then, and the number of replacements is not known. Therefore, as to how many, if any, of these siphon tubes are the ones sold by L & M to Indian Springs, there is no identifying testimony.

5. Items S, T, and W: 1 John Deere 18' Tandem Disc w/ 20" Discs; 1 Eversman Ditcher w/ hydraulic controls. No s/n; and 1 Richardson Model 1400 Silage Trailer w/ Hydraulic Dump s/n 1607. Although referred to only generally in the security agreement respectively as (Item S) either a "Disk Harrow" or a "John Deere Disk BW," a (Item T) "Used Ditcher," and (Item W) a "Green Chop Wagon," which undisputed evidence showed to be the same as a silage trailer, the Court finds, under the previously enunciated legal standard, that these descriptions are sufficient to establish a valid PCA lien as to these items. As to whether Item S is the "Disk Harrow" or the "John Deere Disk BW" enumerated in the security agreement, it does not matter as either or both of these descriptions imparted sufficient notice to third parties that at least one piece of equipment like Item S, ascertainable upon reasonable inquiry, was covered by the PCA lien.

6. Item V: 1 1965 Chevrolet Truck with Home Built Stock Rack s/n 36357118877. As no evidence was presented to the Court on this item, the Court declines to make any finding concerning it, leaving it for the present in the custody of the Trustee.

7. Item X: 1 John Deere Model 935 Land Plane 12' x 30'. This item being sufficiently described in the security agreement as "Land Plane 935 #935-02," the Court finds a valid PCA lien attached to this item.

8. Item BB: 2 Rear Dual Wheels and Tires 18.4 x 38 for John Deere Tractor. As the evidence showed that

these tires must have been on either one or the other of the John Deere Tractors listed in the security agreement, the Court finds that they were sufficiently described to have the lien attach.

9. Items DD and EE: 2 John Deere 3 Bottom/2 Way Plows. As only one "3 Bottom Reversible plow" was listed in the security agreement, the Court finds that this is not sufficient identification or notice to include both plows under the PCA lien. Therefore, the Court finds a valid PCA lien exists only as to one plow. Since a third party would see only one such item specifically listed in the security agreement, he should be able reasonably to assume that another identical item, if secured, would be just as specifically listed. See In Re Laminated Veneers, supra note 2, at 15.

The Court notes that although under the broad standard of UTAH CODE ANN. §70A-9-110 the descriptions set forth in this case have generally sufficed, much time and expense could have been saved had a more careful, precise listing, including correct serial numbers, been made in the first place.

The remaining question concerns whether PCA can elect to foreclose or execute, if its claim is reduced to judgment, on the personal property above specified first, without impairing its secured position on the real property, or whether it must foreclose or execute simultaneously on both the real and personal property covered in its lien. Related to this issue is the question of whether PCA can apply the proceeds from the sale of said personal property in their entirety to the debt they secure or whether it must pro rate these proceeds with the proceeds it could obtain from the real property which also secures the debt.

UTAH CODE ANN. §70A-9-501 (1953) explains the procedure followed in a default where the security agreement covers both

real and personal property. Subsection (1) of this section says the secured party may "reduce his claim to judgment, foreclose or otherwise enforce the security interest by any available judicial procedure."

Subsection (4) of UTAH CODE ANN. §70A-9-501 (1953) deals with foreclosure and states that

if the security agreement covers both real and personal property, the secured party may proceed under this part as to the personal property or he may proceed as to both the real and personal property in accordance with his rights and remedies in respect of the real property in which case the provisions of this part do not apply.

Whether this allows a party to foreclose first on the personal property and then on the real property in a separate action is not clear, but it has been suggested that this provision would allow the secured party to foreclose on the personal property under the Code and against the real property under state real property law. See 69 AM.JUR.2d Secured Transactions §559 at 450 n. 80 (1973). If this is true, it would necessitate two separate actions. The one action rule in Utah deals only with real property⁹ and so is not a bar to this form of proceeding. Furthermore, Utah has no anti-deficiency statute to prevent the obtaining of a judgment for the excess owed after foreclosure on the personal property, to be satisfied out of the real property securing the debt. Nor will this reduction to judgment destroy the security in the real estate. See UTAH CODE ANN. §70A-9-501(5) (1953). See also McMurdie v. Chugg, 99 Utah 403, 107 P.2d 163 (1940). Thus, although no case has been found dealing directly with this subject, it appears that PCA can foreclose first in a separate action on the personal property while retaining its lien on the real property in the amount of the deficiency.¹⁰ Such a conclusion is buttressed by UTAH CODE ANN. §70A-9-501(1) (1953)

which says: "The rights and remedies referred to in this subsection are cumulative."

If PCA chooses to reduce its claim to judgment, subsection (5) of UTAH CODE ANN. §70A-9-501 (1953) makes it clear that the resulting judgment lien relates "back to the date of the perfection of the security interest in such collateral" and that a judicial sale in execution is considered "a foreclosure of the security interest by judicial procedure within the meaning of this section." Again, the question arises as to whether this allows a completely separate sale of the personal property first before moving against the real property to satisfy the remainder of the debt. Under the same reasoning applied in the case of foreclosure, it appears that such a separate sale is allowed.

Likewise, it seems that under either option PCA can choose to apply the proceeds from the personal property totally to the debt without being required to pro rate. This is a logical conclusion from the remedy given the creditor in UTAH CODE ANN. §70A-9-501(4) (1953) which in essence allows the creditor to satisfy his debt out of whichever secured property he chooses.

In a filed memorandum, L & M raises the question of its right to require execution on the personal property first if the claim against it is reduced to judgement based on the inter-relationship between UTAH CODE ANN. §70A-9-501(5) (1953) and Rule 69(e)(3) of the Utah Rules of Civil Procedure. Since in his testimony, the representative of PCA stated that if it had any right to decide the order of either execution or foreclosure, it would proceed against the personal property first, the preference also of L & M, it is not necessary for the Court to comment on this argument, having already found such a right on the part of PCA.

Although a question of marshaling has been raised, this is an equitable remedy left to the discretion of the court to be applied only when it will not work injustice or injury to any party. See 53 AM.JUR.2d Marshaling Assets §4 at 9 et seq. (1973). Here, if marshaling were required, L & M would be injured at the extent of a forced foreclosure on its real property which is not a subject of this proceeding. Thus this remedy is inappropriate. The Court will require, however, a report on the procedures followed by PCA and the results of the foreclosure or execution with an accounting for the use of the proceeds to be submitted to the Court within 30 days of such action.

ORDER

Judgment shall be entered in accordance with this opinion.

Dated this _____ day of May, 1979.

Ralph R. Mabey
Bankruptcy Judge

FOOTNOTES

¹U.S. v. First Nat'l Bank, 470 F.2d 944 (8th Cir. 1973).

²In Re Laminated Veneers, 471 F.2d 1124 (2d Cir. 1973).

³U.S. v. Crittenden, 563 F.2d 678 (5th Cir. 1977); In Re Turnage, 493 F.2d 505 (5th Cir. 1974).

⁴In Re Munger, 495 F.2d 511 (9th Cir. 1974); Biggins v. Southwest Bank, 490 F.2d 1304 (9th Cir. 1973).

⁵See 69 AM.JUR.2d Secured Transactions §395 at 241 (1973). Contra Mammoth Cave Production Credit Association v. York, 429 S.W.2d 26 (1968) (More than a blanket description for farm equipment required). This case concerned, however, the sufficiency of a blanket description over after acquired property. But see U.S. v. First Nat'l Bank, *supra*, which specifically rejected the Mammoth Cave reasoning and holding.

⁶The U.S. Court of Appeal for the Tenth Circuit, in In Re Fuqua, 461 F.2d 1186 (10th Cir. 1972), found that a description of collateral as "all personal property," not limited to that found in a certain county, was insufficient to satisfy the requirement of KAN. STAT. §84-9-402. The Court's decision today is not out of line with the Tenth Circuit's pronouncement which relied heavily on interpretation of Kansas law and the comments to their statutes. The Circuit did not comment in its opinion on the exact degree of sufficiency required, but only that it must be a "type" of goods under KAN. STAT. §84-9-402, and that because of the language in KAN. STAT. §84-9-110 which says that "any description of personal property . . . is sufficient," it requires some description "to elaborate on the naked phrase 'all personal property.'" *Id.* at 1188. But see In Re Werth, 443 F. Supp. 738 (D.Kan. 1977) (interpreting Kansas law).

⁷In Re Turnage, *supra*; In Re Laminated Veneers, *supra*.

⁸In Re Vintage Press, Inc., 552 F.2d 1145 (5th Cir. 1977); Improved Mach. Inc. v. Delta Molded Prod., Inc., 416 F. Supp. 938 (N.D.Ala. 1976), aff'd sub nom Sterne v. Improved Mach., Inc., 571 F.2d 957 (5th Cir. 1978).

⁹UTAH CODE ANN. §78-37-1 (1953).

¹⁰See 53 AM.JUR.2d Marshaling Assets §6 at 13 (1973). But see Walker v. Community Bank, 111 Cal.Rptr. 897, 518 P.2d 329 (1974). This case held that a Bank's foreclosure on personal property first waived its security in the real estate which also secured the debt. This decision, however, is based on construction of California's one action rule (§726 of the California Code of Civil Procedure) which differs from Utah's. Utah's one action rule applies only to debts "secured solely" by a mortgage upon real estate (UTAH CODE ANN. §78-37-1 (1953)) while the California statute applies to any debt "secured" by a mortgage on real estate. The California statute was interpreted in this case to apply to a mortgage secured by both real and personal property, a construction which cannot possibly be applied to the Utah statute.

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FOR THE DISTRICT OF UTAH

Central Division

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INC.,
A Utah Corporation,

Bankrupt,

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RAY TWELVES, Trustee,

Plaintiff,

vs.

PRODUCTION CREDIT ASSOCIATION,
L & M ENTERPRISES, BROADHEAD
DISTRIBUTING COMPANY, JENKINS
SALES AND SERVICE, DAIRY
CAPITAL CORPORATION, and RIVER
BOTTOM EQUIPMENT LEASING, LTD.,

Defendants.

RIVER BOTTOM EQUIPMENT LEASING
CO., LTD.,
A Utah Limited Partnership,

Bankrupt,

Bankruptcy No. B 77-00063

W. STERLING MASON, JR.,
Trustee,

Plaintiff,

vs.

JUDGMENT

PRODUCTION CREDIT ASSOCIATION,
L & M ENTERPRISES, and INDIAN
SPRINGS FARM AND RANCH, INC.,


Defendants.

This action came on for trial before the Court,
Honorable Ralph R. Mabey, Bankruptcy Judge, presiding, and
the issues having been duly tried and a decision having been
duly rendered,

IT IS ORDERED AND ADJUDGED that judgment be entered
in accordance with the decision rendered in this matter, which

decision is incorporated by reference herein.

Dated at Salt Lake City, Utah, this 31 day
of May, 1979.



Ralph R. Mabey
Bankruptcy Judge