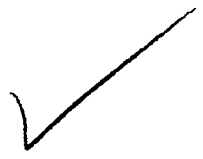


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IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF UTAH
CENTRAL DIVISION

243 a

IN RE:)
SWEETWATER, a Utah)
corporation, et al.,)
Reorganized Debtor)
& Debtor in Possession)
_____)
THE LOCKHART CO., a Utah)
corporation,)
Plaintiff,)
v.)
MULTI-RESORT OWNERSHIP)
PARTNERSHIP, a Utah limited)
partnership, et al.,)
Defendants.)

83A-02582

86PA-0766

MEMORANDUM DECISION

_____)
WELDON L. DAINES, an indivi-)
ual, et al.,)
Appellants,)
v.)
MULTI-RESORT OWNERSHIP)
PARTNERSHIP, a Utah limited)
partnership,)
Appellee.)

Case No. 87-C-0247S

Appellants, Weldon L. Daines, Richard W. Ringwood and George L. Leach, claim a perfected security interest in certain contracts under which debtor Sweetwater Corporation sold interests in recreational property. The bankruptcy court held that appellants' security interest became unperfected under Utah Code Ann. § 70A-9-403(2) (1953, as amended). The appellants seek reversal of this decision. § 70A-9-403(2) provides as follows:

Except as provided in subsection (6) [inapplicable to the instant case] a filed financing statement is effective for a period of five years from the date of filing. The effectiveness of a filed financing statement lapses on the expiration of the five-year period unless a continuation statement is filed prior to the lapse. If a security interest perfected by filing exists at the time insolvency proceedings are commenced by or against the debtor, the security interest remains perfected until termination of the insolvency proceedings and thereafter for a period of sixty days or until expiration of the five-year period, whichever occurs later. Upon lapse the security interest becomes unperfected, unless it is perfected without filing. If the security interest becomes unperfected upon lapse, it is deemed to have been unperfected as against a person who became a purchaser or lien creditor before lapse.

The facts are undisputed. On October 19, 1978, appellants perfected their security interest in the subject contracts by filing a financing statement. On September 23, 1983, about one month before the appellants' perfected

security interest would have lapsed, Sweetwater filed Chapter 11 bankruptcy. Under Utah Code Ann. § 70A-9-403(2) (1953, as amended), a security interest perfected by filing, which is in effect upon commencement of the bankruptcy, remains perfected for 60 days after termination of the insolvency proceeding or until the expiration of the five-year period, whichever is later. Since appellants' perfected security interest would have lapsed prior to termination of the insolvency proceeding, their security interest remains perfected for 60 days after termination. The appellants did not file a new financing statement or continuation statement within 60 days after the effective date of the confirmed reorganization plan, June 19, 1984.

As part of the reorganization plan, appellee Multi-Resort Ownership Partnership (MROP) was created to consolidate several limited partnerships involved with Sweetwater. All of the partnerships' property, including the contracts in which appellants claim a perfected security interest, was transferred to MROP subject to valid perfected liens. Under the reorganization plan, Sweetwater and MROP jointly retained the right to challenge security interests in the transferred property. At the time the plan was confirmed, several

parties asserted an interest in the contracts, including the Lockhart Company, the appellants and others.

On February 14, 1984, about four months prior to confirmation of the plan, the appellants filed a proof of claim asserting its perfected security interest in some of the contracts. On the effective date of the plan, June 19, 1984, the appellants' security interest remained in effect. On November 16, 1984, some five months after the effective date of the confirmed reorganization plan, Sweetwater objected to the appellants' proof of claim because no continuation statement had been filed within sixty days of the termination of the insolvency. The bankruptcy court has not specifically addressed the objection.

The issue of the validity of the appellants' security interest comes to the court on appeal from summary judgment granted in favor of MROP in an adversary proceeding filed on December 18, 1984. Lockhart Company filed the adversary proceeding as an interpleader action after the court ruled Lockhart did not have a perfected security interest in the contracts it previously possessed. Lockhart had received \$152,103.32 in proceeds from these contracts and sought

resolution of entitlement among the various claimants. \$29,092.89 was directly traceable to contracts in which appellants claim to hold a perfected security interest. On February 20, 1987, the bankruptcy judge granted MROP's motion for summary judgment against the appellants, holding that appellants' perfected security interest lapsed because a continuation statement was not filed within 60 days of the effective date of the reorganization plan. Appellants seek reversal of this decision.

The appeal raises two issues; 1) when did the insolvency proceeding terminate for purposes of commencing the sixty-day period in Utah Code Ann. § 70A-9-403(2)(1953, as amended), and 2) were appellants required to file a continuation statement to maintain their perfected status? Appellants contend they were not required to file a continuation statement to maintain their perfected security interest. Appellants also contend they may still file a continuation statement because the insolvency proceeding has not terminated so long as MROP's objection to appellants' timely proof of claim remains unresolved. This court, however, concurs in the bankruptcy court's resolution of each issue.

In re Nardulli & Sons Co., Inc., 66 B.R. 871 (Bankr. W.D.Pa. 1986) and its companion case In re Nardulli & Sons Co., Inc., 66 B.R. 882 (Bankr. W.D.Pa. 1986) are persuasive. The cases cited by appellants, including In re Chaseley's Foods, Inc., 726 F.2d 303 (7th Cir. 1984); In re Funding System Asset Management Corp., 38 B.R. 351 (W.D.Pa. 1984); and In re Delia Brothers, Inc., 29 UCC Rep. 1446, (S.D.N.Y. 1980), are not persuasive because they deal with perfection during the pendency of the insolvency proceedings. The Nardulli cases are on point because they define the termination date of Chapter 11 insolvency proceedings and address the requirement to file a continuation statement after confirmation of a reorganization plan.

In the Nardulli cases, a creditor held a perfected security interest in certain equipment obtained by filing financing statements prior to commencement of a Chapter 11 bankruptcy. Before the reorganization plan was confirmed, the financing statements would have lapsed but for a provision identical to Utah Code Ann. § 70A-9-403(b). The court ruled the creditors had sixty days from the effective date of the confirmation of the reorganization plan to file a continuation statement or financing statement. Since creditors did not file said statement, their perfected

security interest lapsed. Upon subsequent conversion to a Chapter 7 liquidation, the interest of the Chapter 7 trustee was held superior to the unperfected interest of the creditors. The Nardulli court reasoned as follows:

In a Chapter 11 reorganization, "termination" occurs on the confirmation date of a Chapter 11 plan, 11 U.S.C. § 1141(a) (or on the effective date or consummation date of the plan if so provided in the plan). In the instant case, Nardulli's plan provides for consummation 30 days after the order of confirmation, or on December 29, 1983. The confirmation date, or consummation date as the plan's effective date if applicable, is a critical date under Chapter 11. Unless otherwise provided in the plan or the order confirming the plan, confirmation discharges the debtor from any debt that arose before the date of confirmation. 11 U.S.C. § 1141(d)(1)(A). Discharge upon confirmation has a broad effect. For example, discharge renders the automatic stay ineffective under Section 362(c)(2)(C) of the Bankruptcy Code. . . . [Citations omitted]. GECC [the creditor] was free of the automatic stay and should have continued its financing statement or filed a new one.

GECC argues that Nardulli's plan provides that the Court will retain jurisdiction of the case after consummation for all purposes until the Class 13 claimants (the unsecured claimants) are paid under the plan. Retention of jurisdiction by the Court to resolve disputes does not reimpose the automatic stay. This retention of jurisdiction does not imply that creditors retain their pre-confirmation security interest in property that vested in the debtor upon consummation of the plan or that it lapsed for failure to maintain perfection.

Nardulli, 6 B.R. at 875-76. The court further reasoned in the companion case that

Many confirmed Chapter 11 debtors operate for longer periods of time before a case is closed or converted. The administrative closing of a case in [sic] not an event of certitude. The confirmation of a plan is a precise event. Important UCC policy goals concerning the certainty of perfection and adequate notice for creditors of existing security interests to creditors are at stake. No important bankruptcy policy would be served by relieving the debtor or creditor of the UCC notice requirements after a Chapter 11 confirmation.

A confirmed plan that has been consummated vests property in the debtor subject to the plan. It becomes the law of the case. [Citation omitted].

It is important to treat these acts with finality. To undo these acts and not treat them with finality would raise uncertainty [sic] with regard to future creditors and to perfection under the UCC. It does not have compensative Bankruptcy policy benefits.


For reasons set forth above, the court concludes that the Chapter 11 insolvency proceeding terminated on the effective date of the confirmed plan, June 19, 1984. Neither retention of jurisdiction by the bankruptcy court to further litigate the validity or extent of perfected security interests nor the fact that the bankruptcy court had under advisement Sweetwater's objection to appellants' secured status relieve the appellants of the statutory requirement to file a continuation statement or financial statement within 60 days of the effective date of the confirmed plan in order to preserve the pre-confirmation security interest. To rule

otherwise would in effect rewrite the statute to read that a perfected security interest, in place upon commencement of bankruptcy, remains indefinitely effective. The decision of the bankruptcy court is accordingly affirmed.

DATED this 11th day of January, 1988.

BY THE COURT:

cc: attys 1/11/88:dp
Nick J. Colessides, Esq.
David E. Leta, Esq.
John A. Beckstead, Esq.
Bankruptcy Court Clerk



DAVID SAM
U.S. DISTRICT JUDGE