UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF NEW YORK

IN RE:

THE BENNETT FUNDING GROUP, INC.	CASE NO. 96-61376
	Chapter 11
Debtors	Substantively Consolidated

APPEARANCES:

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Hon. Stephen D. Gerling, Chief U.S. Bankruptcy Judge

MEMORANDUM-DECISION, FINDINGS OF FACT,
CONCLUSIONS OF LAW AND ORDER

Pursuant to an Order of this Court, signed December 9, 1998 ("December 9 Order"), approving a "Stipulation Regarding Lift Stay Litigation by Banks Identified Below Regarding Transactions with Aloha Capital Corporation" ("Stipulation"), executed as of November 23, 1998, by and between Richard C. Breeden, as chapter 11 trustee ("Trustee") of Aloha Capital Corporation, f/k/a Bennett Leasing Corporation (the "Corporation" or the "Debtor") and other Debtors substantively consolidated therewith (the "Debtors"), the Official Committee of Unsecured Creditors (the "Committee"), and various banks (the "Banks"), including ESB Bank, F.S.B. ("ESB"), the Court is to determine certain issues ("Common Issues") concerning ESB's claimed perfection of a security interest in certain equipment leases ("Leases") and postpetition lease payments ("Proceeds").[1]

The Common Issues include:

[1] The other Banks have been declared intervenors, giving them the right to participate in the matter before the Court. *See* December 9 Order at ¶ 3.

1. Whether a UCC-1 financing statement filed under the name "Bennett Leasing Corporation" prior to the date the Corporation filed a Certificate of Amendment in Delaware is effective to perfect a security interest in ESB's Leases and Proceeds.

2. Whether a UCC-1 financing statement filed under the name "Bennett Leasing Corporation" after the date the Corporation filed a Certificate of Amendment in Delaware is effective to perfect a security interest in ESB's Leases and Proceeds.

3. Whether 11 U.S.C. § 546(b) applies such that ESB has a perfected security interest in the Proceeds as a result of its possession of original signed chattel paper under the stipulated facts.

Following the submission of briefs by the parties in accordance with the schedule set forth in the Stipulation at ¶ 5, the Court heard oral argument on March 25, 1999, in Utica, New York, and the matter was submitted for decision at that time.

JURISDICTIONAL STATEMENT

The Court has core jurisdiction over the parties and subject matter of this contested matter pursuant to 28 U.S.C. §§ 1334(b), 157(a), (b)(1) and (b)(2)(A), (G) and (O).

FACTS

A. Background Facts

1. Bennett Leasing Corporation was incorporated in the State of Delaware on December 30, 1994. *See* Exhibit A of the Stipulation.

2. The Corporation did not file a Certificate of Incorporation in New York State.

3. Since its date of incorporation, the principal place of business and chief executive office for the Corporation has been 2 Clinton Square, City of Syracuse, County of Onondaga, State of New York.

4. On January 16, 1996, the Corporation filed an Application For Authority to do Business in the State of New York (the "Application") with the State of New York Department of State. *See* Exhibit B of the Stipulation.

5. On February 23, 1996, the Corporation filed a Certificate of Amendment (the "Amendment") of its Certificate of Incorporation with the Delaware Department of State, purportedly changing its name to "Aloha Capital Corporation." *See* Exhibit C of the Stipulation.

6. The Corporation never filed a certificate of amendment or other document amending its Application with the State of New York Department of State.

7. On April 25, 1996, an involuntary petition for relief was filed against the Corporation under 11 U.S.C. § 303 in the United States Bankruptcy Court for the Northern District of New York.

8. On May 10, 1996, the Court entered an Order for Relief against the Corporation.

9. The Trustee was appointed chapter 11 trustee for the Corporation on May 14, 1996, and the appointment was approved by the Court on May 15, 1996.

10. The Corporation's chapter 11 case was substantively consolidated on July 25,

1997 with the other Debtors' cases in Case No. 96-61376.

B. The December 5, 1995 Transaction

11. On December 5, 1995, ESB entered into a transaction (the "December 5 Transaction") with the Corporation.

12. As part of the December 5 Transaction, the Corporation executed and delivered to ESB certain documents, including

a) a Promissory Note, with an amortization schedule, which states that the principal sum of $749,210.17 is payable;

b) an Assignment of Contracts, with Schedule A identifying the subject leases[2];

c) a Servicing Agreement concerning the subject leases;

d) a Bill of Sale, with Schedule A identifying the subject leases;

e) Payment Account Agreement;

f) Surety Agreement with Schedule A identifying the subject leases;

g) Guarantee Collateral Agreement;

h) Private Label Due Diligence Agreement;

i) Certificate; and

j) Chief Executive Officer's Certificate

("December 5 Transaction Documents"). *See* Exhibit E of the Stipulation.

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[2] Schedule A identifies certain base rental payments (the "Schedule A Payments). Other payments (the "Non-Schedule A Payments") are or may be also due under the contracts identified in Schedule A to the Assignment of Contracts.

13. On December 1, 1995, ESB took possession of each and every original, ink-signed lease which is listed on the schedule to the Assignment of Contracts and the schedule to the UCC-1 financing statements for the December 5 Transaction.

14. As part of the December 5 Transaction, on December 5, 1995, ESB transferred to the Corporation the amount of $706,096.81.

15. On January 2, 1996, a UCC-1 financing statement was filed with the State of New York Department of State in connection with the December 5 Transaction identifying the "debtor" as "Bennett Leasing Corporation." *See* Exhibit F of the Stipulation.

16. No other UCC-1 financing statements were filed with the State of New York Department of State in connection with the December 5 Transaction identifying the "debtor" as "Bennett Leasing Corporation."

17. On January 2, 1996, a UCC-1 financing statement was filed with the Onondaga County Clerk's Office in connection with the December 5 Transaction identifying the "debtor" as "Bennett Leasing Corporation." *See* Exhibit G of the Stipulation.

18. No other UCC-1 financing statements were filed with the Onondaga County Clerk's Office in connection with the December 5 Transaction.

19. ESB also subsequently took possession on the following dates of the following original, ink-signed leases that were substituted for non-performing leases and which are not listed on the schedule to the Assignment of Contracts and the schedule to the UCC-1 financing statements for the December 5 Transaction:

Substituted Lease	Date of Substitution
#95092052 HHL Financial Services	December 14, 1995

C. The February 28, 1996 Transaction

20. On February 28, 1996, ESB entered into a transaction with the Corporation (the "February 28 Transaction").

21. As part of the February 28 Transaction, the Corporation executed and delivered to ESB certain documents including:

a) a Promissory Note, with an amortization schedule, which states that the principal sum of $492,125.70 is payable;

b) an Assignment of Contracts, with Schedule "A" identifying the subject leases[3];

c) a Surety Agreement with Schedule A identifying the subject leases;

d) a Servicing Agreement, with Schedule "A" identifying the subject leases:

e) a Bill of Sale, with Schedule A identifying the subject leases;

f) Payment Account Agreement;

g) Guarantee Collateral Agreement;

h) Private Label Due Diligence Agreement;

i) Certificate; and

j) Chief Executive Officer's Certificate

("February 28 Transaction Documents"). *See* Exhibit H of the Stipulation.

22. On February 28, 1996, ESB took possession of each and every original,

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[3] Schedule A identifies certain base rental payments (the "Schedule A Payments"). Other payments (the "Non-Schedule A Payments") are or may be also due under the contracts identified in Schedule A to the Assignment of Contracts.

ink-signed lease which is listed on the schedule to the Assignment of Contracts and the schedule to the UCC-1 financing statements for the February 28 Transaction.

23. As part of the February 28 Transaction, on February 28, 1996, ESB transferred to the Corporation the amount of $475,758.54.

24. On March 15, 1996, a UCC-1 financing statement was filed with the Onondaga County Clerk's office in connection with the February 28 Transaction identifying the "debtor" as "Bennett Leasing Corporation." *See* Exhibit J of the Stipulation.

25. No other UCC-1 financing statements were filed with the Onondaga County Clerk's Office in connection with the February 28 Transaction.

26. On March 18, 1996, a UCC-1 financing statement was filed with the New York State Department of State in connection with the February 28 Transaction identifying the "debtor" as "Bennett Leasing Corporation." *See* Exhibit I of the Stipulation.

27. No other UCC-1 financing statements were filed with the New York State Department of State in connection with the February 28 Transaction.

D. Facts Common To Each ESB Transaction

28. The Debtors made a total of $119,799.38 in payments to ESB in connection with the transactions described above within 90 days of the Corporation's petition date.

29. ESB has received no payment from the Corporation in connection with the foregoing two transactions since April 20, 1996.

30. As of April 20, 1996, the Corporation was indebted to ESB in the following principal sums concerning the above two transactions:

Transaction Date	Amount Due
December 5, 1995	$645,422.28
February 28, 1996	$479,244.42

31. On March 3, 1997, ESB filed a motion seeking relief from the automatic stay.

32. On September 11, 1997, the Court issued an Order Granting Provisional Relief which directed the Trustee to segregate and account for the lease proceeds due ESB in connection with the above two transactions.

ARGUMENTS

December 5 Transaction

The Trustee and the Committee assert that the filing of the Amendment with the Delaware Secretary of State on February 23, 1996, effected a change in the Corporation's name and, pursuant to § 9-402(7) of the New York Uniform Commercial Code ("NYUCC"), the financing statements filed by ESB on January 2, 1996, continued to be effective through June 22, 1996, to perfect its security interest in the Leases and the Proceeds received up to that point. However, as a result of the name change, they argue that the financing statements were seriously misleading and required ESB to file new or amended financing statements in order to continue any security

interest it might have in Proceeds received after June 22, 1996.[4] The Trustee and the Committee take the position that the Proceeds received after June 22, 1996, constitute new collateral for purposes of NYUCC § 9-402(7). They contend that collateral estoppel precludes ESB from arguing otherwise based on the Court's prior findings that the lease payments are separate collateral from the leases in prior decisions. *See, e.g., In re The Bennett Funding Group, Inc.*, No. 96-61376 (Bankr. N.D.N.Y. May 6, 1998) ("Carmi Decision") and *In re The Bennett Funding Group, Inc.*, No. 96-61376 (Bankr. N.D.N.Y. Oct. 15, 1997) ("ESB Decision").

ESB makes the argument that if NYUCC § 9-402(7) has any application to the matter herein, it was not required to file new or amended financing statements because those on file were not seriously misleading. ESB directs the Court's attention to the Application, filed by the Debtor with the New York Secretary of State, which was in the name of "Bennett Leasing Corporation." ESB contends that the Debtor continued to do business in the name of "Bennett Leasing Corporation" after the Amendment. ESB also points out that because the financing statements were required to be filed in New York where the Debtor had its principal place of business, the name under which the Debtor was authorized to do business in New York should govern the determination of what name should have been used in completing the financing statements. The Banks also argue that it was not necessary to file new or amended financing statements pursuant to NYUCC § 9-402(7) before June 23, 1996, because the intervening bankruptcy nullified any notice requirement given the fact that the Trustee had "open and notorious" possession of any Proceeds as of the commencement of the case. ESB argues that the

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[4] "A 'new appropriate financing statement' may be either a new financing statement or an amendment to an earlier filed financing statement." *In re Meyer-Midway, Inc.*, 65 B.R. 437, 442 (Bankr. N.D. Ill. 1986) (citing UCC § 9-402(7)).

Court's focus should be on what a reasonably prudent search would have uncovered on the petition date. Although the Trustee, as a hypothetical lien creditor, is without knowledge of any security interest, the Banks assert that he is not relieved from having to make reasonable inquiry into any possible security interests that may exist with respect to the Debtor's assets. The Trustee responds that a reasonable inquiry would have required that a searcher look under the proper name of the Corporation and had that been done, ESB's financing statements would not have been discovered. The Committee further argues that as long as the Debtor complied with the laws of the state of its incorporation in amending its name, ESB was required to file new or amended financing statements within the four month period following the Amendment. It takes exception to the Banks' suggestion that the tolling provisions found in NYUCC § 9-403(2) with respect to filing a continuation statement also have application to the requirement that a secured creditor file a new or amended financing statement pursuant to NYUCC § 9-402(7).

Furthermore, ESB contends that NYUCC § 9-402(7) is inapplicable because the Proceeds do not constitute new collateral. While acknowledging the Court's prior determination that proceeds constitute different collateral from the leases themselves, ESB argues that the Court's earlier finding was made in the context of perfection of proceeds by possession. ESB argues that the Court made no determination that proceeds of the leases were new or after-acquired collateral.

February 28 Transaction

It is the position of the Trustee and the Committee that ESB's financing statements were ineffective to perfect its security interest in the Leases and the Proceeds *ab initio* because the

financing statements, filed on March 15 and March 18, 1996, incorrectly identify the "debtor" as "Bennett Leasing Corporation" at a time subsequent to the filing of the Amendment changing its name to "Aloha Capital Corporation."

ESB contends that the Court should focus on whether the financing statements sufficiently identified the "debtor" at the time they were filed. ESB again points out that at that time the only evidence of a name change was the Amendment filed with the Secretary of State in Delaware. ESB asserts that the Application, filed with the Secretary of State in New York on January 16, 1996, was never amended to reflect the name change. In addition, ESB directs the Court's attention to the CEO's Certificate, dated February 28, 1996, in which Michael A. Bennett indicates that all representations made by the Corporation as of February 28, 1996, are true and correct. Included in the CEO's Certificate is the statement that "Bennett Leasing Corporation" is a corporation organized and existing under the laws of the State of Delaware. *See* ¶1 of CEO's Certificate (Included in Exhibit H of the Stipulation). The Banks contend that a reasonably prudent searcher would have discovered ESB's financing statements filed under the Debtor's former name, "Bennett Leasing Corporation," as identified in the Application on file with the Secretary of State in New York where the Corporation had its principal place of business. The Trustee asserts that just as trade names are too uncertain to form the basis of a notice filing system, names in an application to do business in a state are even more unreliable and may even be obsolete. Therefore, it is the Trustee's position that one must use the Debtor's corporate name on file in Delaware, the state of incorporation, which on March 15 and 18, 1996, when the financing statements were filed, was "Aloha Capital Corporation."

Application of Code § 546(b)

The Banks contend that the Trustee is collaterally estopped from relitigating the legal issue of whether Code § 546(b) can be applied with respect to the perfection of ESB's security interest in the Proceeds as a result of its possession of the Leases. The Court in its Carmi Decision, as well as several other related decisions involving The Bennett Funding Group, Inc. ("BFG"), one of the consolidated Debtors, found that Code § 546(b) may be used to perfect a security interest in lease payments. The Trustee and the Committee point out that in the prior decisions addressing Code § 546(b), the Court found that the financing statements filed by the banks were ineffective from the date they were filed because they incorrectly identified the "debtor" by its trade name, rather than by its corporate name. They argue that this is to be distinguished from the December 5 Transaction in which the financing statements filed by ESB correctly identified the "debtor" as "Bennett Leasing Corporation." The Debtor's change of its corporate name, the Committee and the Trustee argue, required that ESB file a new or amended financing statement within four months. It is the Committee's position that nothing prevented ESB from filing a new or amended financing statement within that four month period to continue its security interest in the Proceeds despite the fact that the Debtor was in bankruptcy for a portion of that time. Under those circumstances, the Trustee and the Committee contend that with respect to the December 5 Transaction "seizure" was not necessary in order for ESB to be able to perfect its security interest in the Proceeds received by the Trustee after June 22, 1996. Therefore, it is the Trustee's and the Committee's position that collateral estoppel does not apply and the Court should re-examine the issues concerning the applicability of Code § 546(b) under the circumstances.

DISCUSSION

Overview

Early on in this case, the Court determined that equipment leases which evidence both the lessees' monetary obligations and are for specific goods are chattel paper. *See In re The Bennett Funding Group, Inc.*, No. 96-61376-79 (Bankr. N.D.N.Y. Oct. 22, 1996). Article 9 of the UCC applies to any transaction that is intended to create a security interest in chattel paper. *See* NYUCC § 9-102(1)(a). A security interest in chattel paper may be perfected either by taking possession of the collateral, *see* NYUCC § 9-305, or by filing a financing statement, *see* NYUCC § 9-304(1). *See Keneco Financial Group*, 131 B.R. 90, 95-96 (Bankr. N.D. Ill. 1991). Of particular concern herein is whether ESB perfected its security interest in the Leases and the Proceeds by filing a financing statement in the name of "Bennett Leasing Corporation."

The purpose of the filing system established under the UCC is to provide notice to interested parties that an entity claims a valid perfected security interest in certain collateral. *See In re Kenco Consol., Inc.*, 153 B.R. 348, 350 (Bankr. M.D.Fla. 1993). The key to notice filing is the financing statement. NYUCC § 9-402(1) requires that a financing statement give the name of the debtor. Because it is indexed according to the debtor's name, it is crucial to the notice filing system that the financing statement correctly identify the debtor. The failure to properly list the debtor has the potential for creating a secret lien which a potential secured creditor[5] may

[5] A potential secured creditor is one that is considering entering into a security agreement with the debtor and must search the filed financing statements to find any prior encumbrances on the debtor's property. *See* Claude Michael Stern, *Debtors' Name or Identity Changes: Distributing Benefits and Burdens Under Article 9*, 32 HASTINGS L.J. 959, 974 (1980).

be unable to detect. *See In re Paramount Internat'l, Inc.* 154 B.R. 712, 716 (Bankr. N.D. Ill. 1993) (noting that filing under a name which is not similar to the debtor's actual name "creates a potential for either deception by a dishonest debtor or for honest mistake."). In the case of a corporation, NYUCC § 9-402(7) indicates that with respect to the debtor's name a financing statement is sufficient if the debtor is identified by its corporate name. The statute makes no mention of the use of a name under which the corporation does business in the state. Indeed, as this Court has previously found, a financing statement identifying the debtor by its trade name is ineffective to perfect a security interest because a search under the debtor's true corporate name would not have uncovered the financing statement indexed under the debtor's trade name. *See* Carmi Decision at 26; ESB Decision at 14. Requiring that a financing statement be filed in the Debtor's legal name comports with the UCC's policy of certainty and consistency in commercial transactions.

NYUCC § 9-402(7) provides that

> [a] financing statement sufficiently shows the name of the debtor if it gives . . . the corporate name of the debtor, whether or not it adds other trade names . . . . Where the debtor so changes . . . its name, identity or corporate structure that a filed financing statement becomes seriously misleading, the filing is not effective to perfect a security interest in collateral acquired by the debtor more than four months after the change, unless a new appropriate financing statement is filed before the expiration of that time.

NYUCC § 9-402(7) (McKinney's 1990 & 1999 Supp.). "When a debtor's name is incorrectly listed on a financing statement, the test is whether a reasonable search under the debtor's true name would reveal the filing, and if so, then the person searching is on notice to inquire further to discover the debtor's correct identity." *Id.* at 715; *see also Kenco Consol.*, 153 B.R. at 350 (noting that a financing statement is effective so long as it puts searchers on inquiry).

In *Paramount* the debtor changed its corporate name from Paramount Attractions, Inc. to Paramount International, Inc. The creditor's financing statement identified the debtor under its former name, which was also the name under which it had been legally authorized to transact business. While concluding that the name change did not render the financing statement seriously misleading, the court pointed out that "had the name change been more significantly different, its failure [to file a new financing statement reflecting the name change] would result in a different decision here." *Paramount*, 154 B.R. at 717.

ESB argues that in determining whether the financing statements filed in connection with the two transactions under discussion were seriously misleading insofar as the Trustee is concerned, the Court should examine whether reasonable inquiry by the Trustee into any possible security interests that might exist with respect to the Leases and the Proceeds would have revealed ESB's financing statements. ESB suggests that reasonable inquiry would have revealed (1) that the transaction documents were executed in the name of "Bennett Leasing Corporation," and (2) that the Debtor's principal place of business was in New York and that the Debtor was authorized to do business in New York under the name of "Bennett Leasing Corporation." Thus, ESB contends that reasonable inquiry would have required that a search be done under the name "Bennett Leasing Corporation."

The problem with ESB's position is that unlike a prospective secured creditor, as a hypothetical lien creditor the Trustee is not obligated to make further inquiry with respect to information contained in financing statements. *See Kenco Consol.*, 153 B.R. at 350. The Trustee is imbued with those powers that state law would permit to an entity which, as of the commencement of the case "had completed the legal processes for perfection of a lien upon

property of the debtor for satisfaction of his claim against the debtor." *In re Swati, Inc.*, 54 B.R. 498, 500 (Bankr. N.D. Ill. 1985) (citation omitted). Thus, where there has been a name change of the debtor, the Trustee need not have been misled and need not have relied on the information found in the financing statement. As a matter of law, in his role as a lien creditor, he is able to defeat any security interest which is not properly perfected.[6]

The financing statements signed on behalf of the Debtor in connection with both transactions at issue herein identify the Debtor as "Bennett Leasing Corporation," the name under which it was incorporated at that time. However, on February 23, 1996, the Debtor amended its Certificate of Incorporation in Delaware, changing its name from "Bennett Leasing Corporation" to "Aloha Capital Corporation." "Aloha Capital Corporation" is significantly different from "Bennett Leasing Corporation," and in keeping with the *dicta* in *Paramount*, this Court concludes that the change rendered ESB's financing statements seriously misleading.

December 5 Transaction

ESB's financing statements filed on January 2, 1996, in connection with the December 5 Transaction in the name of "Bennett Leasing Corporation" were effective to perfect ESB's security interest in the Leases identified in Schedule A, including the substitution made on December 14, 1995. However, pursuant to NYUCC § 9-402(7), having found that the financing

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[6] If knowledge and reasonable inquiry were the standard by which one were to measure a trustee's ability to defeat an unperfected security interest, a debtor-in-possession that is given the same power as the trustee pursuant to Code § 1107 would never be successful as the debtor-in-possession in the role of a hypothetical lien creditor would certainly have knowledge of the name change and, therefore, the financing statement would never be seriously misleading even though it did not reflect the name change.

statements filed on January 2, 1996, became seriously misleading, they were not effective to perfect a security interest in collateral acquired by the Debtor more than four months after the name change on February 23, 1996. However, ESB's security interest in the Leases remained perfected.[7]

The real issue being raised by the parties is whether that continued perfection in the Leases encompassed the Proceeds received after June 22, 1996. NYUCC § 9-402(7) requires that a "new appropriate financing statement" be filed with respect to "collateral acquired by the debtor more than four months after the change." The Trustee and the Committee assert that Proceeds received after June 22, 1996, constitute after-acquired property. They argue that this Court previously found that the lease payments were a different form of collateral (*see* ESB Decision at 15-17 and Carmi Decision at 43-45), and, therefore, collateral estoppel prevents ESB from arguing to the contrary. It is the Trustee's and the Committee's position that ESB's financing statements were ineffective to perfect its security interest in Proceeds received after June 22, 1996, four months from the date the Debtor amended its Certificate of Incorporation to change its name to "Aloha Capital Corporation." *See* Trustee's Memorandum of Law, filed February 1, 1999, at 10 and Committee's Memorandum of Law, filed January 28, 1999, at 17. The two argue that there was nothing to prevent ESB from filing amended financing statements to reflect the name change postpetition prior to June 23, 1996.

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[7] Nothing in the facts would indicate that ESB acquired any additional leases after June 22, 1996, in connection with the December 5 Transaction for which it would have been required to file a new or amended financing statement pursuant to NYUCC § 9-402(7). Therefore, the Court need not address the arguments made by some of the Banks that the tolling provisions found in NYUCC § 9-403(2) with respect to filing a continuation statement also have application to the requirement that a secured creditor filing a new or amended financing statement with respect to collateral acquired more than four months after a change in the Debtor's name.

ESB acknowledges the Court's prior determination that the lease payments constituted collateral different from the leases themselves in the context of perfection by possession. ESB contends that the Court's prior finding did not address whether their being different collateral equates with a finding that they are new or after-acquired collateral for purposes of NYUCC § 9-402(7).

It is unnecessary for the Court to determine if collateral estoppel applies to the question of whether the Proceeds constitute after-acquired collateral for purposes of NYUCC § 9-402(7). The Trustee and the Committee fail to recognize that under NYUCC § 9-402(7), a creditor is required to file a "new *appropriate* financing statement" (emphasis added) in order for it to remain effective in perfecting a security interest in collateral acquired by the debtor more than four months after the name change. Pursuant to NYUCC §§ 9-304 and 9-306, a security interest in proceeds consisting of money or cash, which the Proceeds in this case are, can only be perfected by possession, not the filing of a financing statement. A financing statement filed within the four month period after the name change would not have been *appropriate* to perfect the Proceeds even if they were deemed to be after-acquired property. Indeed, as long as a creditor has perfected a security interest in the underlying collateral, a financing statement need not expressly cover proceeds in order for it to have a perfected security interest therein. *See In re Karl A. Neise, Inc.*, 31 B.R. 409, 413 (Bankr. S.D.Fla. 1983) (citing NYUCC § 9-306); *Keneco Financial*, 131 B.R. at 94. Therefore, the fact that ESB did not file a new or amended financing statement with respect to the Proceeds does not render its security interest therein unperfected with respect to those received by the Trustee after June 22, 1996. Whether its security interest in those Proceeds was perfected based on ESB's filing of its financing statements January 2,

1996, depends on whether the Proceeds are identifiable pursuant to NYUCC § 9-306(3)(b). This issue is not now before the Court pursuant to the terms of the Stipulation. *See* Stipulation at 3 n.2

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February 28 Transaction

In connection with the February 28 Transaction, ESB filed its financing statements on March 15, 1996, and March 18, 1996, identifying the "debtor" as "Bennett Leasing Corporation." As the Court earlier concluded, those financing statements were seriously misleading. In the opinion of this Court, it was ESB's burden to have made a timely check of the Secretary of State's records in Delaware where the Debtor was incorporated to assure itself of the Debtor's correct identity at the time it filed its financing statements. *See In re A-1 Imperial Moving & Storage Co., Inc.*, 11 UCC Rep. Serv. 1243, 1244 (S.D.Fla. 1972); *see also Houchen v. First Nat'l Bank (In re Taylorville Eisner Agency, Inc.)*, 445 F.Supp. 665, 669 (S.D.Ill. 1977). While both of these cases actually address the need for a secured party to take steps to insure that it will become aware of any name, identity or corporate change of its debtors within four months of perfecting an interest in collateral by filing, it is evident to the Court that the same burden falls to the secured party when it is initially taking steps to perfect its security interest in collateral.

ESB and/or the Banks point out that the Amendment was filed with the Secretary of State in Delaware on Friday, February 23, 1996, and that correct information may not have been available to a searcher until Monday, February 26, 1996, two days before the Transaction Documents were executed, giving ESB a small window in which it might have discovered the

name change. ESB directs the Court to the CEO's Certificate, dated February 28, 1996, indicating that "Bennett Leasing Corporation" is a corporation organized and existing under the laws of the State of Delaware when, in fact, its name had been changed on February 23, 1996. The fact of the matter is, however, that ESB did not file its financing statements until almost two weeks after the name change. Given the size of the transaction, it behooved ESB to take reasonable steps to assure itself that the financing statements were accurate at the time that they were filed in order to protect its security interest in the Leases. The Court concludes that the financing statements were ineffective *ab initio* as to the Trustee in his role as a lien creditor and that ESB's security interest in the Leases was not properly perfected by filing under NYUCC § 9-304(1) in connection with the February 28 Transaction.

Code § 546(b)

As mentioned previously, a security interest in chattel paper may be perfected by possession of the collateral, as well as by filing a financing statement. In this case, to the extent ESB has possession of the ink-signed original Leases[8], it has a perfected security interest in them pursuant to 13 Pa. Cons. Stat. Ann. § 9305 (West 1997).[9]

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[8] The question of whether or not all the Leases meet the criteria for being chattel paper is not an issue to be addressed by the Court herein according to the terms of the Stipulation. *See* Stipulation at ¶ 8.

[9] "In a multistate transaction, perfection of a *possessory* security interest in chattel paper is governed by the law of the jurisdiction where the collateral is when the last event occurs on which is based the assertion that the security interest is perfected.' *See* NYUCC § 9-103(3) and 9-103(1)(b). Thus, the Pennsylvania Commercial Code, 13 Pa. Cons. Stat. Ann. §§ 1101-9507 ("PAUCC"), governs with respect to [ESB's] that it perfected its security interest in the Leases by possession because it appears that, on the date of filing, [ESB] possessed the original Leases in its offices located in . . . Pennsylvania." ESB Decision at 11 n. 12.

The lease payments are "proceeds" of the Leases within the meaning of NYUCC § 9-306.[10] "The security interest in proceeds is a continuously perfected security interest if the interest in the original collateral was perfected . . . ." NYUCC § 9-306. Said perfection continues automatically for ten days after receipt of the proceeds by the debtor. Generally, in order to maintain perfection of a security interest in proceeds, a properly filed financing statement must cover the original collateral and the proceeds must be identifiable cash proceeds (*see* NYUCC § 9-306(3)(b)) or the security interest in proceeds must be separately perfected before the expiration of the ten day period *(see* NYUCC § 9-306(3)(c)).

In connection with the December 5 Transaction, ESB has a basis for claiming a security interest in the Proceeds pursuant to NYUCC § 9-306(3)(b) given the Court's finding that ESB filed proper financing statements covering the Leases. However, with respect to the February 28 Transaction, as discussed earlier, ESB failed to file proper financing statements *ab initio*. Therefore, if ESB is to continue its perfected security interest in the Proceeds by virtue of its possession of the Leases in connection with the February 28 Transaction, it must have taken

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[10] "NYUCC § 9-103 makes no reference to the law applicable in a multistate transaction to the perfection of a security interest in cash proceeds per se. It appears that under either a federal interest-based choice of law analysis or New York choice of law rules, New York would have the dominant interest in having its law be determinative of the Bank's interest in any Lease Payments because the Lease Payments would appear to be located in New York. *Cf. Kunstsammlungen Zu Weimar v. Elicofon*, 536 F.Supp. 829, 846 (E.D.N.Y. 1981) (quoting comment a to § 246 of the Restatement (Second) of Conflict of Laws (1971) for the proposition that '[t]he state where a chattel is situated has the dominant interest in determining the circumstances under which an interest in the chattel will be transferred . . .'), *aff'd*, 678 F.2d 1150 (2d Cir. 1982); *In re Scott's Estate*, 129 Misc. 625, 222 N.Y.S. 515 (1927) (and cases cited therein) (dealing generally with the situs of cash deposits and the rights thereto for taxation purposes)." ESB Decision at 15 n. 13.

separate steps pursuant to NYUCC § 9-306(3)(c).[11]

The Court previously addressed arguments made by ESB that its security interest in lease payments became automatically perfected when it took possession of certain leases in connection with its transactions with BFG. *See* ESB Decision at 15. It is ESB's position that the Trustee and the Committee are collaterally estopped from arguing that ESB does not have a perfected security interest in the Proceeds by virtue of the Court's prior decisions, including the ESB Decision and the Carmi Decision. Under those decisions, the Court concluded that under Code § 546(b) "[i]n order to continue its perfected security interest in the lease payments as they are received by the debtor, the bank must give proper notice" to the Trustee of its intent to seize the lease payments where applicable state law otherwise requires seizure for perfection.

"Under collateral estoppel, once an issue is actually and necessarily determined by a court of competent jurisdiction, that determination is conclusive in subsequent suits based on a different cause of action involving a party to the prior litigation." *Montana v. United States*, 440 U.S. 147, 153, 99 S.Ct. 970, 973, 59 L.Ed.2d 210 (1979) (citations omitted). In order for collateral estoppel to apply,

> "(1) the issues in both proceedings must be identical, (2) the issue in the prior proceeding must have been actually litigated and actually decided, (3) there must have been a full and fair opportunity for litigation in the prior proceeding, and (4) the issue previously litigated must have been necessary to support a valid and final judgment on the merits."

United States Securities & Exchange Commission v. Monarch Funding Corp., 983 F.Supp. at

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[11] The fact that ESB may assert a perfected security interest in the Proceeds by virtue of having filed proper financing statements in connection with the December 5 Transaction, does not preclude it from also claiming a perfected security interest in the same Leases and Proceeds by virtue of its possession of the Leases as the two options for perfecting a security interest in chattel paper are mutually exclusive.

446-47 (quoting *Gelb v. Royal Globe Ins. Co.*, 798 F.2d 38, 44 (2d Cir. 1986). Pendency of an appeal does not deprive a judgment of its preclusive effect.[12] *See United States v. All Right, Title & Interest in Real Property & Building known as 303 West Universal City Studios Inc.*, 901 F.2d 288, 292 (2d Cir. 1990) (citations omitted).

The Trustee had a full and fair opportunity to litigate the question of whether Code § 546(b) could be utilized to perfect a security interest in lease payments in connection with a motion filed by Marine Midland Bank, N.A. ("Marine") seeking reconsideration of the Court's decision dated March 30, 1997 (s*ee Marine Midland Bank, N.A. v. The Bennett Funding Group, Inc. (In re The Bennett Funding Group, Inc.)*, No. 96-61376-79, Adv. Pro. 96-70061 (Bankr. N.D.N.Y. March 30, 1997)). On August 11, 1997, the Court rendered a decision in which it granted Marine relief from the automatic stay based on a finding that Marine's security interest in certain lease proceeds had been perfected pursuant to Code § 546(b). *See Marine Midland Bank, N.A. v. The Bennett Funding Group, Inc. (In re The Bennett Funding Group, Inc.)*, No. 96-61376-79, Adv. Pro. 96-70061 (Bankr. N.D.N.Y. Aug. 11, 1997) ("Marine Reconsideration Decision").

This Court previously found that the Trustee "vigorously argued" the Code § 546(b) issue in connection with the Marine Reconsideration Decision and that resolution of the Code § 546(b) issue was essential to its ultimate decision to grant Marine relief from the automatic stay. *See* Carmi Decision at 48-49. That issue is the same one that concerns this Court herein, namely

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[12] The ESB Decision and the Carmi Decision, as well as several other related decisions involving other banks that entered into financing transactions with BFG similar to those ESB entered into with the Corporation, are currently on appeal with the United States District Court for the Northern District of New York.

whether the legal question addressed by the Court in the Marine Reconsideration Decision, as well as in the ESB Decision and the Carmi Decision concerning the applicability of Code § 546(b), is identical to the one now before the Court.

To address this question, the Court must examine

> "[F]irst, whether the issues presented by the [second] litigation are in substance the same as those resolved [in the first]; second, whether controlling facts or legal principles changed significantly since the [first] judgment; and finally whether other special circumstances warrant an exception to the normal rules of preclusion."

ITT Corp. v. United States, 963 F.2d 561, 564 (2d Cir. 1992) (quoting *Montana v. United States*, 440 U.S. at 155, 99 S.Ct. at 974).

None of the parties have suggested that there have been any legal principles that have changed significantly since the prior decision. The Committee asserts that in the ESB Decision, as well as the Carmi Decision, the Court "did not address, let alone resolve, (a) whether a UCC-1 financing statement filed under the name Bennett Leasing Corporation remained effective after the Debtor changed its corporate name to Aloha Capital Corporation where the Bank failed to file an amended financing statement within the four-month period established under NYUCC 9-402(7), (b) whether a UCC-1 financing statement filed under the name Bennett Leasing Corporation after the Debtor changed its corporate name to Aloha Capital Corporation is effective to perfect a security interest in the Leases and the Proceeds, or (c) whether section 546(b) applies to transactions covered by the previous two scenarios." Committee's Memorandum of Law at 19-20. So too the Trustee argues that the Court did not previously decide "the applicability of Section 546(b) where the debtor changes it corporate name within four months of bankruptcy." *See* Trustee's Memorandum of Law at 17. It is the Trustee's

position that with respect to the December 5 Transaction seizure was not necessary to perfect ESB's security interest in the Proceeds because ESB could simply have filed a UCC-3 statement amending its original financing statements. *See id.*

The Committee and the Trustee are correct in their assertion that in the prior decisions addressing the applicability of Code § 546(b) in perfecting a security interest in proceeds, the Court did not address the impact that a name change of a debtor might have on a creditor's security interest in chattel paper. However, the name change and its potential impact on the effectiveness of ESB's financing statements is not pertinent to the Court's analysis of whether ESB has a perfected security interest in any of the Proceeds received by the Trustee postpetition based on ESB's possession of the Leases. Therefore, the Court concludes that the facts necessary for the determination of the issue have not significantly changed and the issue *sub judice* is in substance the same as that resolved in the earlier decisions, namely whether ESB has a perfected security interest in the Proceeds as a result of its possession of the original, ink-signed Leases. Therefore, the Court finds that Code § 546(b) applies to ESB's possession of the original signed Leases and its perfection of a security interest in the Proceeds under the stipulated facts.

IT IS SO ORDERED.

Dated at Utica, New York

this 16th day of November 1999

STEPHEN D. GERLING
Chief U.S. Bankruptcy Judge