UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF NEW YORK

IN RE:

THE BENNETT FUNDING GROUP, INC.	CASE NO. 96-61376
BENNETT RECEIVABLES CORPORATION	96-61377
BENNETT RECEIVABLES CORPORATION II	96-61378
BENNETT MANAGEMENT AND DEVELOPMENT CORPORATION	96-61379
	Chapter 11
Debtors	Jointly Administered

THE HOWARD BANK, N.A.

Movant

vs.

RICHARD C. BREEDEN, TRUSTEE
and the OFFICIAL COMMITTEE OF
UNSECURED CREDITORS

Respondents

APPEARANCES:

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

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

This matter is before the Court by way of an Order to Show Cause, dated June 19, 1997. The Howard Bank N.A. (the "Bank" or "Howard") requests limited discovery from at least one appropriate employee of The Bennett Funding Group, Inc. ("Debtor" or "BFG") concerning the place of business of the Debtor and the Debtor's use of the name "Aloha Leasing." In addition, Howard requests discovery regarding the indexing and filing procedures utilized by the Onondaga County Clerk's office and the New York State Department of State ("Secretary of State"). In order to carry out this discovery, the Bank requested an adjournment of the evidentiary hearing ("Evidentiary Hearing") on its motion seeking relief from the automatic stay and adequate protection pursuant to sections 362(d) and 363(e) of the Bankruptcy Code (11 U.S.C. §§ 101-1330) ("Code"), filed May 20, 1996 ("Motion for Relief").[1] The Bank also requests an opportunity to file supplemental declarations and to brief "all issues not decided by the Court in the October Decision, without encumbrance by the May Decision and other decisions of the Court which may be based on less than all available facts and theories." *See* Howard's Motion at ¶24. Opposition to the Bank's motion was filed on behalf of the Official

[1]The Bank's Evidentiary Hearing was scheduled to be held on June 30, 1997, in Utica, New York, pursuant to an Order Scheduling Evidentiary Hearing and Requiring Presentation of Evidence by Declarations/Depositions, filed April 9, 1997 ("Scheduling Order"). The Court's Scheduling Order provided for the presentation of testimony of witnesses through declarations/depositions, under penalty of perjury, otherwise admissible under the Federal Rules of Evidence, and set forth a schedule for the filing of said declarations/depositions, as well as for the filing of evidentiary objections and reply declarations/depositions and a pre-hearing brief over a ten-week period. The Bank's initial declarations were to filed May 16, 1997 and its reply declarations were filed on June 20, 1997. According to the docket, as of June 27, 1997, neither party had filed its pre-hearing brief.

Committee of Unsecured Creditors ("Committee") on June 24, 1997. Richard Breeden, the trustee ("Trustee") appointed in this case, filed his opposition to the motion on June 25, 1997.

The motion was heard at the Court's regular motion term in Utica, New York, on June 26, 1997. The matter was submitted for a written decision by the Court following the hearing that day.

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

On October 22, 1996, this Court issued a decision ("October Decision") setting forth certain criteria for perfecting a security interest in equipment leases alleged to be collateral for loans made to the Debtor by various banks throughout the United States. *See In re The Bennett Funding Group, Inc.*, 203 B.R. 30 (Bankr. N.D.N.Y. 1996). The only ordering paragraph in the October Decision required the Trustee to file and serve a particularized response to each of the banks' motions, including that of Howard, "asserting specific objections he might have to each Bank's claim of a perfected security interest in particular leases and the income stream derived therefrom." *See id.* at 39.

Neither the Trustee nor any of the banks sought reconsideration of the October Decision.

However, in his Particularized Response in Further Opposition to the Bank's Motion for Relief from the Automatic Stay ("Trustee's Particularized Response"), filed December 19, 1996, the Trustee expressly reserved his right

> to appeal from any final Order incorporating or relying upon certain of the conclusions of law set forth in the [October Decision], particularly the conclusion that filing a UCC financing statement filed under the name "Aloha Leasing, a Div. of The Bennett Funding Group, Inc." is sufficient to perfect a security interest in collateral of debtor The Bennett Funding Group, Inc. In order to avoid the possibility of repeating the process of serving particularized responses, the Trustee will object herein to any UCC financings filed under the name of "Aloha Leasing, a Div. of The Bennett Funding Group, Inc." and reserves the right at any factual hearing to offer proof that such financing statements could not have provided notice to subsequent creditors.

See Trustee's Particularized Response at 2 n.2. The Trustee opposed the Bank's Motion for Relief "on the grounds that the UCC financing statement identifies the Debtor as 'Aloha Leasing, a Div. of The Bennett Funding Group, Inc.' and the Bank has failed to produce evidence that the financing statement was in fact filed under the name of the Debtor, The Bennett Funding Group, Inc., in both the Office of the Onondaga County Clerk and the New York Department of State." *See id.* at 5, 8, 10, 13, 16, 18, 21, 23-24, 26-27, 29, 31-32, and 34. The Trustee also asserted opposition to the Bank's Motion for Relief "on the grounds that the Bank has failed to provide evidence that it tendered the filing fee required by New York law for filing the financing statement under more than one name in both the Onondaga County Clerk's office and the office of the New York Secretary of State." *See id.*

On May 30, 1997, following an evidentiary hearing on March 31, 1997, the Court issued a decision on a motion by Marine Midland Bank ("Marine") in this case seeking relief from the automatic stay pursuant to Code § 362(d). *See Marine Midland Bank v. The Bennett Funding Group, Inc. (In re The Bennett Funding Group, Inc.)*, No. 96-61376, Adv. Pro. 96-70061 (Bankr.

N.D.N.Y. May 30, 1997) ("Marine Decision").[2] In the Marine Decision, the Court concluded that

> the assumptions it relied upon in rendering its October Decision, which were based in large part on the arguments of the banks' counsel, were incorrect at least with respect to the filing system in the county in which the Debtor does business in this State. If Onondaga County utilized a system which permitted a search of the full text of the Debtor's name, the Court's prior conclusions with respect to the inclusion of the Debtor's trade name would have had merit. Confronted with the actual operative facts, the Court must reconsider its position. Accordingly, the Court concludes that the UCC-1's filed by Marine in the Onondaga County Clerk's Office in the name of "Aloha Leasing" were ineffective in that they failed to provide a creditor with notice sufficient to warrant further inquiry concerning the leases. . . . A reasonable search for financing statements under the name of "Bennett Funding Group, Inc." would not have revealed financing statements filed in the name of "Aloha Leasing, a Div. of the Bennett Funding Group."

See id. at 34.

ARGUMENTS

The Bank asserts that "[t]he cornerstone of the October Decision was that the Uniform Commercial Code ('UCC') Financing Statements filed on behalf of Howard, and other similarly situated banks, with the Onondaga County Clerk and the New York Secretary of State with the 'Debtor box' containing the words 'Aloha Leasing, a Div. of The Bennett Funding Group, Inc.' (the 'UCC Filings') were properly filed as a matter of law under UCC Section 9-402(7)." *See* Howard's Motion at ¶2. The Bank argues that prior to the Marine Decision there was no notice to counsel for the banks which were parties to the October Decision that the Court was going to

[2]For purposes of the decision herein the Court will assume that the parties are familiar with both the October Decision and the Marine Decision.

"reverse" its decision as to the effectiveness of the financing statements. *See id.* at ¶4. The Bank also contends that "if the Court were inclined to modify its October Decision due process required that all counsel who participated in the briefing process for the October Decision be provided with an opportunity to participate before a new decision was rendered." *See id.* at ¶11; *see also id.* at ¶19 (stating "[w]hen the Court ruled in favor of the Banks in the October Decision, it eliminated from the case any factual issues relating to UCC Filings."). The Bank takes the position that, like Marine, it has not had a full and fair opportunity to litigate the issues since it believed the October Decision controlled. *See id.* at ¶10. The Bank asserts that the Trustee never made a formal motion to reconsider the October Decision. *See id.* Furthermore, the Bank notes that the Trustee in his answering papers to its Motion for Relief made no allegations that any of the UCC filings were invalid because of an alleged improper designation of the Debtor. *See id.* at ¶17.

The Bank asserts that the "change of position of the Court in the [Marine Decision] is based upon the Declaration of Jacqueline Dacey ('Dacey'")," who performed a computer search under the name "Bennett Funding Group" at the Onondaga County Clerk's Office which generated a list which did not contain either of the financing statements filed in favor of Marine's predecessor-in-interest which identified the debtor as "Aloha Leasing, a Div. of Bennett Funding Group, Inc." *See* Howard's Motion at ¶5. The Bank contends that had a similar search been performed in the Office of the Secretary of the State in the name of "Bennett Funding Group, Inc.," a list of Marine's financing statements, as well as Howard's, would have been generated even though they identified the "debtor" as "Aloha Leasing, a Div. of The Bennett Funding Group, Inc." *See id. at* ¶8 and Exhibit A of Howard's Motion. It is the Bank's position

that since the Court indicated as one of its grounds for the Marine Decision that there were no allegations that the Onondaga County Clerk made an error in its indexing system, the fact that a search of the New York Secretary of State's records generated the Bank's financing statements filed in the name "Aloha Leasing, a Div. of The Bennett Funding Group, Inc." may be indicative that the Court made an inaccurate finding based upon less than all available facts. *See id* at ¶9.

The Bank argues that since it is likely that the financing statements were properly filed with the Secretary of State and since the Bank believed that additional discovery concerning the UCC filings was not relevant based on the October Decision, it should now have an opportunity to determine whether the Debtor had another place of business in New York and also to investigate the Debtor's prepetition use of the name "Aloha Leasing." The Bank asserts that even if the Dacey Declaration is correct, if the Debtor had a second place of business in any other county in NewYork, the filing in the Office of the Secretary of State would be sufficient. *See* Howard's Motion at ¶20. The Bank contends that there also were certain legal arguments concerning perfection of postpetition rights in proceeds by possession which "were not relevant and were not implicated in the Appendix to the October Decision in which the Court set forth the submissions required from each bank." *See id.* at ¶23. These include *inter alia* the argument that under Code § 546(b) the Bank's Motion for Relief constituted "seizure of 'possession' of proceeds for the purposes of the post-petition perfection in proceeds under UCC § 9-306(3)(c)," and that the Trustee is "the agent of the Bank under the Servicing Agreements or alternatively is a bailee under UCC § 9-305, and, therefore, the Bank is perfected with respect to proceeds of the original Contracts [leases]." *See id.* at ¶22. The Bank asserts that "due process requires that all banks require a fair opportunity to fully present their legal positions before a final decision

on the 'proceeds issue' is rendered." *See id. at* ¶23.

The Trustee opposes the Bank's motion, describing it as "little more than an untimely and meritless attempt to delay a long-planned trial . . . ." *See* Trustee's Opposition at 2. The Committee also opposes the motion describing it as a "second bite at the apple" and suggesting that it "says nothing more than 'if we had known how this Court would rule on all issues in advance of the hearing on our motion for stay relief, we would have prepared our case differently.'" *See* Committee's Opposition at 2.

The Trustee takes exception to the Bank's position that it did not conduct any discovery regarding UCC filing issues because no mention was made of a problem by the Trustee when he first opposed Howard's motion on July 15, 1996. The Trustee asserts that from the moment the Bank sought relief from the automatic stay it should have been "prepared to establish a *prima facie* case that its trade-name filing validly perfected its security interest" and through discovery should have requested any evidence it believed was necessary to establish its case.[3] *See id.* at 12.

In response to the Bank's assertion that the October Decision "established undisputed rights of the banks in the proceeds of these Contracts," the Trustee contends that the October Decision "did not purport to finally adjudicate any party's rights" and could not have a preclusive effect. *See id.* at 3. The Trustee argues that this Court clearly contemplated holding evidentiary hearings to adjudicate the rights of individual banks and, accordingly, ordered the Trustee to file and serve his Particularized Response on each of the banks which had sought relief from the automatic stay. The Trustee contends that the Bank was given notice in the Particularized

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[3]The Trustee points out that all discovery had to be served by the Bank by August 23, 1996, which was prior to the Court's October Decision. *See* Trustee's Opposition at 11.

Response that the Trustee intended "to avail himself of the Court's invitation and proceed with his vigorous challenge to the UCC financing statements which failed to identify the Debtor." *See id.* at 10.

The Trustee asserts that the Bank's request for additional discovery concerning the Debtor's prepetition place(s) of business is unnecessary and discovery concerning the Debtor's prepetition use of a trade name is irrelevant. *See id.* at 12. The Trustee points out that the Bank has the declaration of one of the Debtor's employees, Paul Szlosek ("Szlosek"), who affirms that the Debtor's only place of business in New York State "at all relevant times was in Onondaga County, New York." *See* Trustee's Opposition at 12. The Trustee takes issue with the suggestion that the Debtor had a place of business in Westchester County as the Bank alleges.[4] The Trustee also takes the position that the Debtor's prepetition use of the name "Aloha Leasing" is irrelevant since the Trustee is given "most favorable creditor" status without knowledge of the Debtor's use of a trade name. *See id.* With respect to any assertion by the Bank that it has been deprived of due process and an opportunity for a full and fair opportunity to litigate, the Trustee points out that Howard has been given an opportunity to establish its case through the declaration process set by this Court to which the Bank asserted no objection.

DISCUSSION

[4]In its motion seeking an adjournment of its Evidentiary Hearing, the Bank has included the declaration of Josephine Fava, who claims to have worked for the Debtor as a sales representative out of her home in Westchester County. *See* Howard's Exhibit B. Trustee, in his opposition, sets forth numerous reasons why the declaration fails to establish that the Debtor had a second place of business in Westchester County. *See* Trustee's Opposition at 13-14 n.8.

In the October Decision the Court did not rule "in favor" of any party and made no finding that any bank was perfected as a matter of law. It could not have "reversed" itself in the Marine Decision as to "effectiveness of the UCC Filings" because it made no determination in October as to the effectiveness of any specific bank's filings. Furthermore, the October Decision did not establish the banks' rights to anything, nor did the Court eliminate any factual issues relating to the UCC filings in the October Decision. Until the parties presented the Court with admissible evidence concerning the abilities of the computer systems in use at the state and local levels as of March 29, 1996 ("Petition Date"), no final determination could be made concerning the effectiveness of the financing statements which complied with § 9-402 of the New York Uniform Commercial Code ("NYUCC").

At the evidentiary hearing of Marine's lift-stay motion on March 31, 1997, the Court was presented for the first time with *evidence* that a computer search of the records of the Onondaga County Clerk's Office performed on February 24, 1997, in the name of "Bennett Funding Group" would *not* have given notice to a potential creditor of a possible pre-existing security interest in the leases held by Marine if the financing statements were indexed in the name of "Aloha Leasing, A Div. of The Bennett Funding Group, Inc." *See* Exhibit H of Dacey Declaration, filed March 3, 1997.[5] As alleged by the Trustee in his September 26, 1996 Memorandum, in order for a search under the name "Bennett Funding" to have generated a list of financing statements identifying the "debtor" as "Aloha Leasing, A Division of The Bennett

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[5]There was no evidence presented at the hearing on Marine's lift stay motion that Dacey's search, although not an official one performed by someone in the Onondaga County Clerk's office, was in any way faulty or legally insufficient. Nor was there any proof that the capabilities of the system utilized by the Onondaga County Clerk's office on March 29, 1996, was any different than on February 24, 1997, when Dacey performed here search.

Funding Group," it would have been necessary to pay a separate fee to have the entry cross-indexed under the name "Bennett Funding Group, Inc." No evidence was provided by Marine, which had the burden of establishing perfection of its security interest, that a search as of the Petition Date would have generated its financing statements in the Onondaga County Clerk's office. There was also no evidence that Marine or its predecessor-in-interest had paid a separate fee to have its financing statements cross-indexed and that the filing officer had simply erred in failing to index them. The evidence which was presented to the Court left it no choice but to reconsider the *assumptions* upon which it relied in issuing its October Decision - what the Bank now describes as having "the effect of reversing the October Order."

The Bank argues that it should be given an opportunity to obtain discovery concerning whether the Debtor has a place of business in more than one county in New York which would make filing in the Onondaga County Clerk's office unnecessary pursuant to NYUCC § 9-401. In connection with the evidentiary hearings, there was nothing in the October Decision which prevented the Bank from submitting additional factual evidence in the form of a deposition from an employee of the Debtor in order to establish that the Debtor did business in more than one county in the State if it believed that was the case.[6] The Bank, however, takes the position that it considered it unnecessary given the findings in the October Decision and its reliance on the Trustee's assertions that the Debtor had only one place of business.

As the Trustee correctly points out, pursuant to the Omnibus Discovery Order issued by

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[6]In the Trustee's Discovery Opposition, he indicates that the declaration of Szlosek, an employee of the Debtor, was served on the Bank pursuant to the Scheduling Order. Szlosek states that the Debtor has had its sole place of business in Onondaga County since he joined the Debtor in 1992. The Trustee states that Howard will have an opportunity to cross-examine Szlosek if it disputes this "fact." *See* Trustees Discovery Opposition at 10.

the Court on July 24, 1996, the Bank had until August 23, 1996, to serve the Trustee with its discovery requests. At the time, the Bank had copies of its financing statements and should have known that they identified the "debtor" as "Aloha Leasing." Because notice is a requisite to properly effecting a perfected security interest by filing, it was incumbent on the Bank at that time to assure itself that its financing statements provided notice to creditors of its filings in both the Secretary of State's office and the Onondaga County Clerk's office unless it could establish that the Debtor had a place of business in more than one county in New York. Allegedly, none of the Bank's discovery requests sought information concerning the location of the Debtor's place(s) of business. It should not now be permitted to seek additional discovery and submit additional declarations prior to its Evidentiary Hearing based on discovery performed subsequent to the Marine Decision. Paragraph ¶2(e) of the Scheduling Order does afford the Bank the opportunity to offer live rebuttal testimony at the Evidentiary Hearing should it deem it appropriate.

With respect to its request that it be permitted to brief all issues not previously decided by the Court, the Bank asserts that in the October Decision "the Court correctly noted that it was not necessary to address the post-petition proceeds issues because it found that the UCC Filings were valid." *See* Howard's Motion at ¶21. The Bank argues that the issue was not fairly raised at any of the prior evidentiary hearings because the banks did not believe the issues were relevant in light of the October Decision. Therefore, Howard requests that the banks be given an opportunity to present their legal positions before a final decision on the "proceeds issue" is

rendered[7], despite the fact that the time for filing its pre-hearing brief pursuant to the Scheduling Order has expired.

In the October Decision, the Court declined to analyze what was necessary to perfect a security interest in the lease payments when the security interest in the underlying collateral, the leases, was perfected by possession since an "overwhelming" number of banks had asserted that they were perfected by virtue of having properly filed financing statements. As noted above, however, the Trustee provided the banks with notice in his Particularized Response that he took exception to the filing of financing statements in the name of "Aloha Leasing" as being proper for purposes of perfecting the banks' alleged security interests. Dacey's declaration also should have alerted the Bank to the need to counter her statements if it was to meet its burden of proof regarding the effectiveness of its filed financing statements. As an alternative, it was incumbent upon the Bank to make whatever legal arguments it deemed appropriate to establish another basis for perfection in the collateral in its pre-hearing brief in the event that the Trustee provided the Court with evidence that the Court's assumptions were not accurate with respect to the computer capabilities in the office of the Onondaga County Clerk. In the Scheduling Order issued in connection with the Evidentiary Hearing, the Bank, as well as the Trustee, was to file its brief "at the time(s) designated for filing its declaration(s)/deposition(s) . . ." asserting whatever legal arguments it deemed appropriate. *See* ¶3 of Scheduling Order. According to the docket of the case, neither party has filed a pre-hearing brief.

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[7]On August 11, 1997, the Court issued a Memorandum-Decision, Findings of Fact, Conclusions of Law and Order in response to Marine's request for reconsideration of the Marine Decision. *See Marine Midland Bank v. The Bennett Funding Group, Inc. (In re The Bennett Funding Group, Inc)*, Case No. 96-61376-79, Adv. Pro. 96-70061 (Bankr. N.D.N.Y. Aug. 11, 1997). Included in that decision was a discussion of the "proceeds issue."

In agreeing to hear the Bank's motion, which as a practical matter adjourned the date of the Evidentiary Hearing, it was not the Court's intent that the time for filing either the declarations or the pre-hearing brief be extended beyond the deadline set in the Scheduling Order. However, since neither party filed a pre-hearing brief, the Court is not going to prevent either from doing so now. The Court certainly cannot foreclose the parties from making whatever arguments they deem appropriate. However, the Court will only consider those for which admissible evidence has already been provided in the declarations and reply declarations and for which it is anticipated evidence will be elicited at the Evidentiary Hearing.

In considering the Bank's request, the Court observes that while a motion seeking relief from the automatic stay pursuant to Code § 362(d) is generally heard in a summary fashion, *see* Code § 362(e), due to the initial chaos of this case and the critical need for stabilization of the Debtor's operations, the Court on several occasions extended the time for the final hearings on the banks' motions, including Howard's. Over the past year or so, the Bank has had an opportunity to conduct discovery and to prepare for its case. Documents have exchanged hands between it and the Trustee, providing information that might otherwise not have been available to either party had the motions been finally adjudicated within the first thirty days following the filing of its motion. Furthermore, pursuant to the Scheduling Order both parties had an opportunity to examine the declarations and exhibits of their respective opponent in advance of the Evidentiary Hearing and in advance of any cross-examination or the submission of pre-hearing briefs. The Court is unable to accept the Bank's assertions that it has been denied due process under these circumstances.

Based on the foregoing, it is hereby

ORDERED that the Bank's motion seeking limited discovery and an opportunity to file supplemental declarations is denied; it is further

ORDERED that the Bank, as well as the Trustee, shall file its pre-hearing brief within twenty days of the date of this Order; it is further

ORDERED that the Bank's request for an adjournment of its Evidentiary Hearing is granted; and it is further

ORDERED that an amended scheduling order will be issued in connection with the date of the Bank's adjourned hearing.[8]

Dated at Utica, New York

this 19th day of August 1997

STEPHEN D. GERLING
Chief U.S. Bankruptcy Judge

[8]The Court wishes to emphasize that the rescheduling of the Bank's Evidentiary Hearing is not intended to allow either party to file additional declarations.