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

APPEARANCES:

ROSSI, MURNANE, BALZANO & HUGHES Attorneys for Tucker Savings & Loan Association Paul Building - 209 Elizabeth St. P.O. Box 209 Utica, New York 13503-0209	THOMAS P. HUGHES, ESQ. Of Counsel
SIMPSON, THACHER & BARTLETT Attorneys for § 1104 Trustee 425 Lexington Avenue New York, NY 10017	WILLIAM RUSSELL, ESQ. Of Counsel
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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 12, 1997. Tucker Federal Savings & Loan Association (the "Bank" or "Tucker") requests limited discovery from "appropriate officers, employees and agents 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, the Bank 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 3, 1996 ("Motion for Relief")[1] The Bank also requests an opportunity to file additional declarations and pre-hearing brief upon completion of the discovery. Richard Breeden, the trustee ("Trustee") appointed in this case, filed his opposition to the motion on June 16, 1997.

The motion was heard at the Court's regular motion term in Syracuse, New York, on June 17, 1997. The matter was submitted for a written decision by the Court following oral argument of the parties.

JURISDICTIONAL STATEMENT

[1]Tucker's Evidentiary Hearing was scheduled to be held on June 16, 1997, in Utica, New York, pursuant to an Order Scheduling Evidentiary Hearing and Requiring Presentation of Evidence by Declarations/Depositions, dated 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 over a ten-week period. Tucker's initial declarations, as well as its pre-hearing brief, were filed May 2, 1997, and its reply declarations were filed June 9, 1997.

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 Tucker, "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.

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 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

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

> 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

Tucker asserts that '[t]he cornerstone of the October Decision was that Uniform Commercial Code ('UCC') Financing Statements filed on behalf of the Bank, 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* Tucker'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 reverse its decision as to the effectiveness of the local UCC Filings." *See id.* at ¶4. Tucker also contends that if the Court were inclined to modify its October Decision due process required that all counsel for the banks having pending motions to lift the stay "be provided with an opportunity to participate before a new decision was rendered." *See id.* at ¶8. Tucker takes the position that Marine did not have a full and fair opportunity to litigate the issues since Marine believed the

October Decision controlled. *See id.* at ¶7. Tucker asserts that the Trustee never made a formal motion to reconsider the October Decision. *See id.*

Tucker contends that it was under the impression that the issue of the proper name of the Debtor was settled as "law of the case" in the Court's October Decision. Tucker asserts that this impression "was reinforced when the Trustee failed to subsequently serve particularized objections to Tucker Federal's motion . . .".[3] *See* ¶7 of Affidavit of Thomas P. Hughes, Esq. in Support of Tucker's Motion ("Hughes Affidavit"), sworn to on June 16, 1997.

The Bank asserts that the "change of position of the Court in the May Decision [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* Tucker'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 Tucker's, would have been generated even though they identified the debtor as "Aloha Leasing, a Div. of The Bennett Funding Group, Inc." *See id.* 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

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[3]At the hearing on June 17, 1997, Tucker's counsel apprised the Court that the Trustee had never filed a particularized response to Tucker's motion. A review of the docket in this case confirms this fact. Indeed, the Trustee's Discovery Opposition does not include any reference to specific language in a particularized response being filed with respect to Tucker's motion which would have put Tucker on actual notice of the Trustee's intent to challenge the UCC financing statements which identified the "debtor" as "Aloha Leasing."

made an error in its indexing system, the fact that a search of the New York Secretary of State's records generated Tucker'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 ¶6.

In addition, the Bank argues that the Trustee's reply papers filed in the Marine proceeding were "fundamentally inconsistent with the October Decision and raise a series of factual and legal issues to which all parties were not provided an opportunity to respond prior to the May [Marine] Decision." *See id.* at ¶12. The Bank asserts that it is now caught in the middle of the evidentiary hearing process and may not be able to "raise issues or discover facts which may be available to other banks." *See id.* at ¶10. The Bank contends that "[i]t is the foundation of the bankruptcy process that similarly situated parties be treated similarly." *See id.* at ¶11. Therefore, it is the Bank's position that it will be prejudiced of it is not permitted to obtain additional discovery relevant to the filing issues and to file additional declarations, brief and memorandum.

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 Discovery Opposition at 2. In response to Tucker'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 which sought relief from the automatic stay. With respect to any assertion by Tucker that it has been deprived of due process and an opportunity for a full and fair opportunity to litigate, the Trustee points out that the Bank has been given an

opportunity to establish its case through the declaration process set by this Court to which Tucker asserted no objection.

DISCUSSION

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 its October Decision. However, Tucker asserts that it was under the impression that the issue of the effectiveness of the financing statements identifying "Aloha Leasing" as the "debtor" was settled as 'law of the case' in the Court's so-called October Decision. The Bank's impression was reinforced when the Trustee failed to subsequently serve particularized objections to the Bank's motion, as directed by the October Decision, thereby leaving Tucker to believe that it had only the Trustee's July 15, 1996 objections with which to contend." *See* ¶7 of Hughes Affidavit.

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.[4] 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 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 Tucker now describes as having "the effect of reversing the October Order."

The Bank argues that it should also be given an opportunity to obtain discovery concerning "whether the debtor or one or more of the affiliated companies subject to the Trustee's consolidated motion had an office in another county in New York State. In addition, it would have made inquiry into the question of whether a reasonably diligent searcher would have, because of the notoriety of the trade name, have [sic] discovered Tucker Federal's financing statements even though they were not indexed under the true name of the debtor." *See*

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[4]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.

¶8 of Hughes Affidavit.

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. 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 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. The fact that the Trustee failed to serve and file a particularized response to the Bank's motion alerting Tucker to the fact that he intended to offer proof that the Bank's financing statements could not have provided notice to subsequent creditors does not relieve the Bank from its burden to establish that its security interest in the leases and the proceeds derived therefrom was properly perfected. Indeed, Dacey's declaration 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. 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 in the appropriate circumstances, however.

With respect to the Bank's request that it be permitted to file a supplemental pre-hearing brief, the Court notes that unlike other banks which have appeared before this Court seeking similar relief, Tucker timely filed its pre-hearing brief. On the other hand, according to the docket in this case the Trustee did not filed a pre-hearing brief in accordance with the Scheduling Order. The Court also notes that the Trustee failed to comply with the Court's order in the October Decision that the Trustee serve Tucker with a particularized response concerning the Bank's financing statements. Therefore, the Court concludes that under those circumstances the Bank is entitled to file a supplemental pre-hearing brief addressing whatever additional legal arguments it deems appropriate given the evidence submitted to the Court in connection with the Bank's Evidentiary Hearing and any testimony Tucker anticipates will be received at the Hearing.

In considering the Bank's request herein 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 Tucker'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's motion seeking to file a supplemental pre-hearing brief is granted to the extent that the Bank, as well as the Trustee, shall have twenty days from the date of this Order in which to submit a pre-hearing brief; 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.[5]

Dated at Utica, New York

this 19th day of August 1997

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

STEPHEN D. GERLING
Chief U.S. Bankruptcy Judge