UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF NEW YORK

In re

WILLIAM G. VANMIDDLESWORTH, JR., Case No. 02-12746

Debtor

WILLIAM G. VANMIDDLESWORTH, JR.,

Plaintiff

-against- Adversary No. 02-90260

ROBERT ZINK and RUTH ZINK,
Defendant(s)

In re

FRANK F. VANMIDDLESWORTH, JR., Case No. 02-12747

Debtor

FRANK F. VANMIDDLESWORTH, JR.,

Plaintiff

-against- Adversary No. 02-90259

ROBERT ZINK and RUTH ZINK,
Defendant(s)

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Hon. Robert E. Littlefield, Jr., U.S. Bankruptcy Judge

MEMORANDUM-DECISION AND ORDER

Presently before the court are competing motions for summary judgment regarding lien rights and priorities against certain livestock of the debtors, William G. Vanmiddlesworth, Jr. and Frank F. Vanmiddlesworth, Jr. (individually "Frank" or "William," or collectively "Vanmiddlesworths" or "Debtors"). The court has jurisdiction over this core proceeding pursuant to 28 U.S.C. §§ 157(a), (b)(1), (b)(2)(F), (b)(2)(K) and 1334(b).

BACKGROUND / FACTS

These Chapter 12 cases were the subject of an earlier decision by this court denying relief from the automatic stay or, in the alternative, adequate protection to creditors Robert and Ruth Zink ("Zinks"). Although familiarity with that decision and the extensive recitation of the factual background provided is presumed, a brief background summary will be helpful for the present motions.

Frank gave a security interest to what is now HSBC Bank ("Bank") in April of 1998 against personalty, including dairy cattle, "now owned or hereafter acquired." (Exhibit 1.)[1] The

[1]All references herein to an "Exhibit" refer to those exhibits attached to the parties' Stipulations as to Facts and Documents filed June 10, 2002 in the Debtors' individual cases and

Bank perfected its security interest by filing a U.C.C.-1 financing statement on or about April 13, 1998.

During November of 2001, the Debtors purchased fifty-four cows from the Zinks. In exchange for financing, the Debtors gave the Zinks a security interest in "54 head of cattle (livestock) including additions, substitutions or replacements." (Exhibit 7.) The Zinks attempted to file a U.C.C.-1 financing statement in connection with this transaction on or about December 5, 2001.

The New York Secretary of State rejected the attempted filing because the form utilized by the Zinks was "an obsolete form that does not contain sections for all information required under Revised Article 9." (Exhibit 10.) The letter of rejection from the state also described how to resubmit the filing with the necessary information. On or about February 1, 2002, the Zinks' attorney resubmitted a U.C.C.-1 financing statement for filing on an official form that was accepted by the Secretary of State on February 4, 2002.

William and Frank filed individual Chapter 13 petitions on April 25, 2002, which were both converted to Chapter 12 on May 17, 2002. The Zinks moved in both cases for an order lifting stay or, in the alternative, for adequate protection. The court denied the motions by decision dated August 1, 2002. That decision was affirmed by the United States District Court in an order dated September 30, 2003. Subsequent to the August 1, 2002 decision, the Vanmiddlesworths filed the instant adversary proceedings requesting this court determine the extent of the lien of the Zinks against the 54 cows they sold to the Debtors.

ARGUMENTS

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referenced in the Addendums as to Facts and Documents filed in the adversary proceedings on March 31, 2003.

The Vanmiddlesworths specifically allege that any security interest of the Zinks is subordinate to the security interest of HSBC. Additionally, the Debtors assert that the fixing of any security interest against the livestock by the Zinks should be avoided as a preference.

The Zinks answered both complaints with a general denial and three affirmative defenses:

1) the complaint fails to state a cause of action; 2) the Zinks' initial December 2001 attempted U.C.C.-1 filing was legally sufficient to perfect their security interest in the cattle, and the Secretary of State wrongfully rejected it; and 3) neither William nor Frank, as tenants in common, acting alone could grant a security interest in the cows to any other entity because "the cows are of such a nature that they are not alike in quality and value and cannot be divided by weight, tale, or measure between the co-tenants." (Zinks' Answer ¶¶ 2 - 4.)

More specifically, the Zinks argue their December 2001 U.C.C.-1 financing statement was decipherable and therefore should be treated as filed. They assert that the Secretary of State's rejection of their filing because"[i]t was on an old form" was wrong and illegal. (Zinks' Mem. p.15.) The Zinks take the position that the December 2001 UCC-1 financing statement form met all the filing requirements of UCC § 9-516(b): it was accompanied by the proper filing fee; it was communicated by an accepted method and medium; it provided the name of the Debtors; it identified the Debtors' last name; it identified the name and mailing address for the secured party; it provided the mailing address for the Debtors; it clearly indicated that the Debtors were individuals; and it was legible.

The Zinks admit that their December 2001 U.C.C. financing statement "was not technically perfect," but they argue the information it contained made it clear that the Debtors were individuals and that their last name was Vanmiddlesworth. (Zinks' Mem. p.17.) In addition,

"common sense alone would tell the filing clerk that 'William' and 'Frank' are first names and that 'Vanmiddlesworth' is a last name." *Id.*

In addition to requesting that summary judgment be granted in their favor in the adversary proceedings, the Zinks seek dismissal of the Debtors' underlying cases. The Zinks argue dismissal is appropriate based upon the conditional orders of dismissal granted in favor of the Chapter 12 trustee.

DISCUSSION

I) *MOTIONS TO DISMISS*

The Zinks' request to have the underlying Chapter 12 cases dismissed is denied. The motions to dismiss were brought by the Trustee and settled by the Trustee. Unless, and until, the Trustee wishes to present final orders of dismissal on his motions, the cases will continue. If the Zinks or any other party in interest believe they have valid grounds and wish to bring their own dismissal motions, they may do so.

II) *MOTIONS FOR SUMMARY JUDGMENT*

Summary judgment is appropriate where there is no genuine issue of material fact, and the moving party is entitled to a judgment as a matter of law. *Westinghouse Credit Corp. v. D'Urso*, 278 F.3d 138, 145 (2d Cir. 2002); *See* FRBP 56(c). The court must draw all inferences in favor of the non-moving party. *Westinghouse Credit Corp. v. D'Urso, supra*. If there is any evidence in the record from which a reasonable inference could be drawn in favor of the non-moving party on a material issue of fact, summary judgment would be improper. *Id.*

The nature of a creditor's property rights in bankruptcy is defined by state law, not federal law. *In re STN Enterprises, Inc.*, 45 B.R. 951, 953 (Bankr. D. Vt. 1984) (citing *Butner v. U.S.*, 440 U.S. 48, 54 (1979)). Thus, the question regarding the validity and perfection of the Zinks'

lien is to be answered by looking to New York law. *Butner v. U.S.*, *supra; In re Masters*, 273 B.R. 773, 775 (Bankr. E.D. Ark. 2002).

The pivotal question is whether the Zinks' security interest was perfected on February 4, 2002, or December 5, 2001. The parties stipulated in the Addendums as to Facts and Documents filed on March 31, 2003, that if the court finds perfection was accomplished on the former date, the Zinks' security interest is avoidable as a preference pursuant to 11 U.S.C. 547(b).[2]

Secured transactions in New York are governed by Article 9 of the New York Uniform Commercial Code ("U.C.C."). Section 9-310 of the U.C.C. addresses when filing is required to perfect a security interest or agricultural lien. Subsection (a) states in part that, with the exception of certain situations not relevant here, "a financing statement must be filed to perfect all security interests." U.C.C. § 9-310(a) (McKinney's 2002). To determine what constitutes a filing and the effectiveness of a filing, § 9-516 of the U.C.C. must be consulted. Section 9-516 provides in relevant part:

> (a) What constitutes filing. Except as otherwise provided in subsection (b), communication of a record to a filing office and tender of the filing fee or acceptance of

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[2]11 U.S.C. § 547 is entitled "Preferences" and subsection (b) states that, with certain exceptions not relevant here,

> the trustee may avoid any transfer of an interest of the debtor in property -
> (1) to or for the benefit of a creditor;
> (2) for or on account of an antecedent debt owed by the debtor before such transfer was made;
> (3) made while the debtor was insolvent;
> (4) made -
> (A) on or within 90 days before the date of the filing of the petition; ... and
> (5) that enables such creditor to receive more than such creditor would receive if -
> (A) the case were a case under chapter 7 of this title;
> (B) the transfer had not been made; and
> (C) such creditor received payment of such debt to the extent provided by the provisions of this title.

the record by the filing office constitutes filing.

(b) Refusal to accept record; filing does not occur. Filing does not occur with respect to a record that a filing office refuses to accept because;

....

(3) the filing office is unable to index the record because:

....

(C) in the case of an initial financing statement that provides the name of a debtor identified as an individual ... the record does not identify the debtor's last name;

....

(5) in the case of an initial financing statement, ... the record does not:

....

(B) indicate whether the debtor is an individual or an organization;

....

(c) Rules applicable to subsection (b). For purposes of subsection (b):

(1) a record does not provide information if the filing office is unable to read or decipher the information;

....

(d) Refusal to accept record; record effective as filed record. A record that is communicated to the filing office with tender of the filing fee, but which the filing office refuses to accept for a reason other than one set forth in subsection (b), is effective as a filed record except as against a purchaser of the collateral which gives value in reasonable reliance upon the absence of the record from the files.

U.C.C. § 9-516 (McKinney's 2002). Finally, subsection (a) of U.C.C. § 9-520 dictates that "[a] filing office shall refuse to accept a record for filing for a reason set forth in Section 9-516(b) and may refuse to accept a record for filing only for a reason set forth in Section 9-516(b)." U.C.C.

§ 9-520(a) (McKinney's 2002). Thus, to be a valid filing, the financing statement must indicate whether the debtor is an individual or an organization and, if an individual, the document must provide the name of the debtor and identify the last name, and it must be in a decipherable form. "Decipher" is defined as

1. to translate from secret writing or code into comprehensible terms; to decode.
2. to read, as that written in obscure, partially obliterated, or badly formed characters; to unfold.
3. to discover or explain the meaning of, as of something that is obscure or difficult to be

understood; ...

Webster's New Universal Unabridged Dictionary 471 (2d ed. 1983).

The Zinks contend that the New York authorities' rejection of their December 5, 2001 filing because they used an antiquated form was improper. However, the communication from the Secretary of State indicated that the problem was not that the form was obsolete but that it did not contain the information required under Revised Article 9 of the U.C.C.

While the form used by the Zinks did not comply with U.C.C. § 9-516(b)(5)(B) (*i.e.*, did not indicate whether the debtor is an individual or an organization), that should not have invalidated the filing. The fatal error involved in the December 2001 submission was not the particular form used but the manner in which the information provided on the form was offered. The form the Zinks submitted in December 2001 required that the debtor's name be listed with the last name to be followed by the first name. The Zinks reversed this by providing the first name followed by the last name. However, the coup de grâce for the December 2001 filing was that the actual spelling of the Debtors' last name as given on the form was not "Vanmiddlesworth," but "Van Middlesworth."[3] It is neither clear nor decipherable whether "William Van Middllesworth, Jr.," as shown on the December 2001 filing, should be indexed under "V" for Van or under "M" for Middlesworth. Even though Frank has a listed middle initial, it would still be unreasonable to have an entry clerk guess whether the Debtors' surname begins with "V" or "M." The logical answer would be, as occurred here, to return the filing and

[3]The court is unsure as to the proper spelling of the Debtors' last name. On the bankruptcy filings, the last names are "Vanmiddlesworth," but both petitions were signed "Van Middlesworth." Also, the corrected February 2002 U.C.C. filing lists the Debtors' last name as "Van Middlesworth." Thus, it would appear that both the Debtors' bankruptcy attorney and the Zinks' bankruptcy attorney believe that the proper spelling is "Vanmiddlesworth," but the Debtors themselves and the Zinks' transactional attorney favor "Van Middlesworth."

allow it to be resubmitted with the names properly listed, last name first. This was done with the February 4, 2002 filing, which makes it absolutely clear that the last name of "Van Middlesworth" should be indexed under "V."

The larger question in this situation is why the Zinks waited almost two months to resubmit their revised U.C.C.-1 filing. The ninety day preference window opened in the latter part of January 2002. The Zinks had more than a month to accomplish a valid filing and remain safely outside the § 547 envelope; for whatever reason, this was not done.

Because the court finds the Zinks' security interest was perfected as of February 4, 2002, the remaining issues raised by the parties are moot. Accordingly, it is

ORDERED, that the Debtors' motion for summary judgment is granted; and it is further

ORDERED, that the February 4, 2002 U.C.C.-1 filing by the Zinks constitutes a preference pursuant to 11 U.S.C. § 547 and is hereby avoided; and it is further

ORDERED, that the Zinks' motions for dismissal and summary judgment are denied.

Dated: February 10, 2004

Hon. Robert E. Littlefield, Jr.
U.S. Bankruptcy Judge