

**IN THE UNITED STATES BANKRUPTCY COURT
EASTERN DISTRICT OF ARKANSAS
PINE BLUFF DIVISION**

IN RE: MEDSOUTH EMERGENCY RESPONSE, INC.

**5:02-bk-11362 E
CHAPTER 7**

**ORDER DENYING MOTION FOR ABANDONMENT IN PART
AND GRANTING MOTION FOR ABANDONMENT IN PART**

On May 15, 2002, Pine State Bank's Motion for Abandonment and the Trustee's response to the motion came on for hearing. In open court, the parties requested that they be allowed to file written stipulations and briefs. The Court granted the request and took the matter under advisement.

The issue presented in this case is whether Pine State Bank (the "Bank") has a properly perfected lien in a 1992 ambulance owned by Debtor and certain assets other than inventory, and if so, whether the Bank's lien may be avoided by the Trustee under 11 U.S.C. §§ 544, 547, 548 and/or 550.¹ This is a core proceeding under 28 U.S.C. § 157(b)(2)(A), and the Court has jurisdiction to enter a final judgment in this case.

FACTS

The parties stipulated to the following facts and exhibits:

(1) The Debtor filed its voluntary petition commencing this case on February 6, 2002. Williams S. Meeks is the duly appointed and acting trustee (the "**Trustee**").

(2) Debtor is indebted to Bank on a loan made on August 19, 1998, in the original sum of \$125,024.00. By its terms, the note also acts as a security agreement (the "**Note/Security**

¹The Trustee asserts that he will file an adversary proceeding, if necessary, to void the Movant's claimed lien on the 1992 ambulance following the Court's ruling on the Bank's Motion for Abandonment if necessary.

Agreement”). A copy of the Note/Security Agreement was introduced as Exhibit A.

(3) The purpose of the loan was to enable the Debtor to purchase a business and its assets which included two ambulances (a 1994 model and a 1992 model), furniture, fixtures, inventory and equipment.

(4) The Note/Security Agreement was guaranteed by two of the stockholders in the Debtor (the “**Guarantee**”). A copy of the Guarantee was introduced as Exhibit B.

(5) The Note/Security Agreement was filed of record with the office of the Lincoln County Circuit Clerk on August 27, 1998 and was filed of record with the office of the Secretary of State of the State of Arkansas on or about September 2, 1998. The Note/Security Agreement acts as the financing statement and no separate financing statement was filed.

(6) Although the Debtor was to return the titles to the ambulances to the Bank, it did not immediately do so.

(7) On August 29, 2000, the Debtor, at the Bank’s request, executed an extension agreement that extended the Note/Security Agreement (the “**Extension Agreement**”). The Extension Agreement was introduced as Exhibit C. Also on August 29, 2000, the Debtor, at the Bank’s request, executed a separate security agreement which grants the Bank a security interest in a 1994 Ford 83V IE GA serial #1FDJS34M8RHB07644 ambulance. A copy of this security agreement was introduced as Exhibit D. The Bank perfected its security interest in the 1994 ambulance by causing its interest to be recorded on the certificate of title to the vehicle. A copy of the title was introduced as Exhibit E.

(8) On August 29, 2000, the Debtor provided the Bank with the title to the 1994 ambulance, although the Bank requested that Debtor provide titles to both the 1992 and the 1994

ambulance. Representatives of the Debtor advised the Bank that the title to the 1992 ambulance could not be located. The Bank requested that the Debtor apply for a lost title but the Debtor either did not do so, or if it did, never gave the title to the 1992 ambulance to the Bank.

(9) On November 9, 2001, both the 1994 and 1992 ambulances were repossessed by the Bank and are still in the Bank's possession.

(10) On the insurance policies maintained by the Debtor, the Debtor had listed the Bank as the loss payee on the 1994 and 1992 ambulances.

(11) If representatives of the Debtor testified, they would testify that the Bank had liens on the items in dispute.

(12) With permission of the Trustee, the Bank has sold a portion of the collateral at issue and holds the funds for disposition as ordered by the Court. The Bank is also in possession of other collateral at issue herein.

(13) The Trustee does not dispute that the Bank has a perfected lien in the 1994 ambulance and a perfected lien in inventory, subject to a possible lien priority dispute with the Bank of Star City who also claims a lien in the inventory.

DISCUSSION

The dispute between the Trustee and the Bank concerns whether the Bank has a properly perfected lien in the 1992 ambulance and the assets other than inventory, and if so, whether the Bank's lien is subject to being avoided by the trustee pursuant to the lien avoidance sections of the Bankruptcy Code (*i.e.*, 11 U.S.C. §§ 544, 547, 548 and 550).

A. The 1992 Ambulance.

In this case, there is no dispute that the Bank holds a security interest in the 1992 ambulance; rather,

the dispute is whether its security interest is perfected such that it is superior to the Trustee's interest as a hypothetical judgment lien creditor under 11 U.S.C. § 544. The Bank argues that its security interest in the 1992 ambulance is perfected based on the following facts: (1) the purchase money Note/Security Agreement secures the Bank's interest in the ambulance; (2) the Debtor would testify that the Bank has a lien on the ambulance; (3) the Bank is shown as loss payee on the ambulance's insurance; (4) the Debtor failed to transfer title to the Bank although requested to do so; and (5) the Bank repossessed the ambulance prior to Debtor's bankruptcy filing and continues to hold possession of the ambulance. The Bank argues that these facts clearly show that the Debtor and the Bank intended for the Bank to have a security interest in the 1992 ambulance, and the Trustee should not be allowed to avoid the intent of the parties solely because the Debtor failed to provide the Bank with title to the 1992 ambulance. The Bank also argues that its security interest was perfected upon repossession of the ambulance.

The Trustee asserts that because the Bank did not perfect its interest under the provisions of Arkansas' Uniform Motor Vehicle Administration, Certificate of Title, and Antitheft Act (the "**Certificate of Title Act**"), Ark. Code. Ann. §27-14-101, *et seq.*, the Bank's security interest is unperfected against the rights of third parties. The Trustee further argues that the Bank's unperfected security interest is therefore voidable by the Trustee pursuant to the trustee's avoiding powers under the Bankruptcy Code, including the "strong arm" powers of the trustee under section 544.

Section 544 of the Code, the "strong-arm clause," enables a trustee to avoid liens on the debtor's property that could have been avoided by a creditor under the applicable local law.²

²Section 544 of the Code provides, in part:

- (a) The trustee shall have . . . the rights and powers of . . .
 - (I) a creditor that extends credit to the debtor at the time of the

Accordingly, to determine whether the Trustee's avoidance power as a hypothetical judgment lien creditor is superior to the Bank's security interest in the ambulance, the Court must look to Arkansas law.

Although article 9 of the Uniform Commercial Code, as adopted by Arkansas, governs the perfection of security interests in most kinds of personal property, it does not govern the perfection of security interests in vehicles. *See* Ark. Code Ann. § 4-9-303 (West 2002) (stating that the local law of the jurisdiction under whose certificate of title the goods are covered governs perfection). Instead, the perfection of security interests in vehicles is governed by the Certificate of Title Act, specifically sections 27-14-802 through 806 of the Arkansas Code. In order to perfect a lien in a vehicle, the Certificate of Title Act requires that the creditor's lien be reflected on a certificate of title issued by the Office of Motor Vehicles, or, in the alternative, a creditor may (i) record the lien on the manufacturer's statement of origin, or (ii) record the lien on an existing certificate of title, and file with the Revenue Division of the Department of Finance and Administration a certified copy of the instrument creating and evidencing the lien or encumbrance. Ark. Code Ann. § 27-14-806(a)(1)(A)-(B) (West 2002). The Arkansas Code further states:

No conditional sale contract, conditional lease, chattel mortgage, or other lien or encumbrance or title retention instrument upon a vehicle, of a type subject to registration under the laws of this state other than a lien dependent upon possession, is valid as against the creditors of an owner acquiring a lien by levy or attachment or subsequent purchasers or encumbrances, with or without notice, until the requirements of this subchapter have been complied with.

Ark. Code Ann. § 27-14-801 (West 2002).

commencement of the case, and that obtains, at such time and with respect to such credit, a judicial lien on all property on which a creditor on a simple contract could have obtained such a judicial lien, whether or not such a creditor exists;

Accordingly, with the exception of liens dependent upon possession, a lien on a vehicle must be perfected under the Certificate of Title Act in order to be valid against the rights of third parties, including the Trustee's rights as a hypothetical judgment lien creditor under section 544. *See In re Jackson*, 265 B.R. 176, 178 (Bankr. W.D. Ark. 2001) (citing *Union Nat'l Bank v. Hooper*, 295 Ark. 83, 87, 746 S.W.2d 550, 552 (1988); *Commercial Credit Corp. v. Nat'l Credit Corp.*, 251 Ark. 702, 704, 473 S.W.2d 881, 883 (1971); *Dardanelle v. Bibler Brothers*, 244 Ark. 534, 537, 426 S.W.2d 152, 153 (1968)). *See also In re Glass*, 286 F. Supp. 859 (W.D. Ark. 1968) (trustee prevails as hypothetical judgment lien creditor where creditor's security interest in vehicle is not perfected under Certificate of Title Act); *In re Shiflet*, 240 F. Supp. 183 (E.D. Ark. 1965) (same).

The stipulated facts clearly show that the Bank failed to perfect its security interest in the 1992 ambulance under Arkansas' Certificate of Title Act. The Bank's lien was not reflected on the ambulance's certificate of title, and the Bank did not comply with the optional methods for perfecting its security interest in the ambulance. It is irrelevant that the Debtor failed to provide the Bank with the certificate of title or obtain a new one; the perfection requirements serve to provide third parties with notice of a lien, and must be complied with in order for a security interest to be perfected. *See e.g., In re Jackson*, 265 B.R. at 177 (debtors failed to have the titles reissued showing creditor as the lien holder). Likewise, the parties' intent regarding the Bank's security interest is irrelevant; these facts indicate that the Bank has a security interest, not that it is perfected. Accordingly, the Bank's security interest is unperfected unless it has a lien dependent upon possession which was perfected upon its repossession of the 1992 ambulance.

Section 27-14-801 of the Certificate of Title Act (quoted above) excepts liens dependent upon possession from the perfection requirements of the Certificate of Title Act. Accordingly, the

Court must determine whether the Bank had a lien dependent upon possession. Arkansas law provides certain creditors with statutory liens dependent upon possession to secure services provided or materials furnished. *See e.g.*, Ark. Code Ann. § 18-45-101, *et seq.* (providing for Artisan’s and Repairman’s liens). None of these such liens are applicable to the Bank’s security interest in the 1992 ambulance. Arkansas’ Uniform Commercial Code also provides certain creditors with possessory liens in limited circumstances. Section 4-9-313(b) of the Arkansas Code provides that a secured party may perfect a security interest in goods covered by an Arkansas certificate of title by taking possession of the goods *only* in the circumstances described in Ark. Code Ann. § 4-9-316(d) (providing for continued perfection of a security interest perfected under the laws of another jurisdiction).³ Because section 4-9-316 is inapplicable to these facts, Arkansas’ Uniform Commercial Code does not provide the Bank with a lien dependent upon possession. No Arkansas statute that the Court is aware of provides the Bank with a lien dependent upon possession under the circumstances of this case. The Court holds that the Bank does not have a lien dependent on possession, and its security interest is unperfected because it failed to comply with the Certificate of Title Act. Accordingly, the Bank’s security interest is subject to avoidance by the Trustee.

B. Assets Other Than Inventory.

The Note/Security Agreement specifically grants the Bank a security interest in “all assets including vehicles and inventory currently owned or hereafter acquired” The Bank asserts that

³Revised Article 9 of the Uniform Commercial Code became effective in Arkansas on July 1, 2001; the Bank repossessed Debtor’s ambulance on November 1, 2001, and accordingly, the Court looks to the law effective at that time regarding perfection of a security interest by possession. Former law provided: “A security interest in goods, instruments, money, negotiable documents, or chattel paper may be perfected by the secured party’s taking possession of the collateral. . . .” Ark. Code Ann. § 4-9-305 (revised by Acts 2001, No. 1439).

this description is sufficient to grant it a security interest in the Debtor's assets other than inventory. The Trustee claims the description is not sufficient to put third parties on notice of what property is being claimed as collateral.

The Bank points out that because the Note/Security Agreement is dated August 19, 1998, its security interest is not governed by Ark. Code Ann. § 4-9-108 which became effective July 1, 2001, after Arkansas adopted revised article 9 of the Uniform Commercial Code. The new article 9 provision regarding the sufficiency of a description of collateral specifically prohibits super-generic descriptions such as "all personal property" or "all the debtor's assets." Ark. Code Ann. § 4-9-108(c) (West 2002). The prior article 9 provision regarding sufficiency of description simply required that the collateral be "reasonably identified." Ark. Code Ann. § 4-9-110 (revised by Acts 2001, No. 1439). Courts applying this section have followed the official comment in holding that the description must merely "make possible the identification of the thing described." See *Womack v. Newman Furniture Co.*, 27 Ark. App. 117, 123-F, 785 S.W.2d 226, 229 (1990). See also *U.S. v. Riceland Foods, Inc.*, 504 F. Supp. 1258, 1262 (E.D. Ark. 1981). The Trustee asserts that the descriptions under attack in the *Womack* and *Riceland Foods* cases are descriptions that are defined by the Uniform Commercial Code, and that is the reason they were found to be sufficient descriptions in those cases. The Trustee argues that the description used in the Note/Security Agreement does not meet this standard since the description "all assets" is not a code defined description.

The Court notes that while the *Womack* court discussed the Uniform Commercial Code's definition of "inventory" as support for the proposition that the description "inventory" is not over broad, this did not appear to be the sole basis of the court's ruling. Additionally, this Court finds no

such discussion or reference to code-defined descriptions in the *Riceland Foods* case. Therefore, the Court gives no consideration to whether the term “assets” is defined by Arkansas’ Uniform Commercial Code. Rather, the Court must determine whether the generic description “all assets” as used in the Note/Security Agreement reasonably identifies the collateral under pre-2001 Arkansas law requiring only that the description make possible identification of the thing described. The Court finds that it does. Certainly, the description “all assets” communicates, if not specifically, thoroughly, the collateral that is claimed. The term “all assets” is a red flag letting third parties know that everything owned by this entity is pledged to another.

Having found that the description of collateral in the Note/Security Agreement is adequate under applicable law, the Court turns to whether the security interest is perfected. A security interest is perfected by filing a financing statement. *See* Ark. Code Ann. § 4-9-310 (West 2002); Ark. Code Ann. § 4-9-302(1) (revised by Acts 2001, No. 1439). The Bank filed the Note/Security Agreement with the Lincoln County Circuit Court and Arkansas Secretary of State in lieu of filing a financing statement in August 1998. Accordingly, the Bank has a perfected security interest in the Debtor’s assets other than inventory, and this interest is not avoidable by the Trustee.

CONCLUSION

For the reasons stated herein, Pine State Bank’s Motion for Abandonment is **DENIED** in part and **GRANTED** in part. The Trustee shall not be required to abandon the Debtor’s interest in the 1992 ambulance but shall abandon the Debtor’s other assets that are secured by the Note/Security Agreement as described in this Order.

IT IS SO ORDERED.

HONORABLE AUDREY R. EVANS
UNITED STATES BANKRUPTCY JUDGE

DATED: _____

cc: Mr. Kyle Havner, attorney for Debtor
Mr. Everett O. Martindale, attorney for Pine State Bank
Mr. William S. Meeks, Chapter 7 Trustee
U.S. Trustee