

SEP 25 2002

IN THE UNITED STATES BANKRUPTCY COURT
EASTERN DISTRICT OF ARKANSAS
JONESBORO DIVISION

By: CEAURELIZABETH ROLAS CLERK
M DEP. CLERK

IN RE: JERRY AND PENNY TOOMBS,
Debtors.

CASE NO. 3:01-bk-30784M
CHAPTER 13

PEOPLES BANK OF PARAGOULD

PLAINTIFF

VS.

AP NO. 3:01-ap-3053

JERRY TOOMBS, JR.; PENNY TOOMBS;
DAVID D. COOP, TRUSTEE; AND THE
UNITED STATES OF AMERICA DEPARTMENT
OF AGRICULTURE FARM SERVICES AGENCY

DEFENDANTS

ORDER

On April 20, 2001, Jerry Toombs, Jr. and Penny Toombs ("Debtors") filed a voluntary petition for relief under the provisions of chapter 13. On December 13, 2001, Peoples Bank of Paragould ("Bank") filed this adversary proceeding against the Debtors; David D. Coop, Chapter 13 Trustee; and the United States. The Bank claims a valid perfected security interest in the proceeds of certain government agricultural payments payable to the Debtors and paid over to the Trustee post-petition as a result of farming operations conducted in the crop year 2000.

Although initially disputing the Bank's claim, the United States and the Debtors have now apparently abandoned their opposition. The Trustee, however, asserts that the Bank claims a security interest in property that became property of the estate after the case was filed and, therefore, the Bank's security interest in after-acquired property was cut off

pursuant to the provisions of 11 U.S.C. § 552(a). Consequently, the funds derived from the government programs should be distributed to unsecured creditors.

The proceeding before the Court is a core proceeding pursuant to 28 U.S.C. § 157(b)(2)(0), and the Court has jurisdiction to enter a final judgment in the case.

On August 5, 2002, the Bank filed a motion for summary judgment pursuant to Federal Rule of Bankruptcy Procedure 7056. In support of the motion, the Bank attached copies of the following documents:

1. A combination promissory note and security agreement dated April 17, 2000, in the principal sum of \$150,000.00 in the name of "Toombs Farms" by Jerry Toombs, Jr., Jerry Toombs, Sr. and Penny Toombs.

The maturity date of the note is March 15, 2001. The security agreement granted the Bank a security interest in collateral described as "Government Payments . . . [including] deficiency payments . . . emergency assistance payments . . . in which I now have and in the future may have any rights or interest and which arise under or as a result of any preexisting, current or future Federal or state governmental program . . ." (Mot. for Summ. J., Ex. A at 2.)

2. Financing Statements listing government payments described above as collateral filed of record on April 28, 2000, with Ellen Johnson, Clerk,¹ and also on April 28, 2000, with the Secretary of State for the State of Arkansas. The financing statement lists Toombs Farms as the Debtor and Peoples Bank as the secured party.

¹ The exhibit does not reflect which court Ellen Johnson serves as clerk.

Attached to the Trustee's Brief in support of response to the summary judgment motion are copies of checks dated August 30, 2001, in the sums of \$1,862.17; \$9,646.64; and \$2,402.78 and a check dated September 21, 2001, in the sum of \$25,024.00. Each check is made payable to David D. Coop, Trustee. The August 30 checks have a notation "Ref: Jerry Toombs Jr. . . . Case Number 01-30784 M." The September 21 check has the notation "Jerry Toombs Jr. W126400-14." (Trustee's Br. in Resp., Ex. A.) Also attached to the Trustee's brief is a letter from the United States Department of Agriculture's office in Paragould, Arkansas, reciting that the September check is payment for "2000 Crop Disaster Program for cotton and soybeans." (Trustee's Br. in Resp., Ex. B.)

The Bank argues simply that 11 U.S.C. § 552(b)(1) applies, and, therefore, the Bank's security interest extends to the government payment in the total amount of \$38,935.59 received by the Trustee since the commencement of the Debtors' case.

The Trustee argues that the checks constitute property acquired by the estate after the commencement of the case, and pursuant to 11 U.S.C. § 552(a) the Bank's security interest in after-acquired property is severed. The Trustee also argues that Section 552(b)(1) does not apply because government program payments do not constitute proceeds within the meaning of that section.

STANDARD FOR SUMMARY JUDGMENT

Summary judgment shall be granted only where it appears from the pleadings, depositions, answers to interrogatories, admissions, and affidavits that there is no genuine

dispute as to material facts and that the moving party is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(c); Fed. R. Bankr. P. 7056; Fields v. Gander, 734 F.2d 1313, 1314 (8th Cir. 1984); Schieffler v. Pulaski Bank & Trust Co. (In re Molitor), 183 B.R. 547, 549 (Bankr. E.D. Ark. 1995); Toshiba Am. Inc. v. Video King, Inc. (In re Video King, Inc.), 100 B.R. 1008, 1012 (Bankr. N.D. Ill. 1989). In determining whether a genuine issue of material fact exists, the court must view the facts in the light most favorable to the party opposing the motion for summary judgment and must give that party the benefit of all reasonable inferences drawn from the underlying facts. AgriStor Leasing v. Farrow, 826 F.2d 732, 734 (8th Cir. 1987) (citing Economy Housing Co. v. Continental Forest Prods. Inc., 757 F.2d 200, 203 (8th Cir. 1985); Fields, 734 F.2d at 1314). To be material, the fact in dispute must affect the outcome of the suit. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248 (1986).

A party opposing a motion for summary judgment may not rely upon the mere allegations of its pleadings but must instead set forth, by affidavit or otherwise, specific facts showing that a genuine issue exists for trial. Fed. R. Civ. P. 56(e); Fed. R. Bankr. P. 7056; Chauffeurs, Teamsters & Helpers Local Union 238 v. C.R.S.T., Inc., 795 F.2d 1400, 1402-03 (8th Cir.) (citing Fed. R. Civ. P. 54(e); Buford v. Tremayne, 747 F.2d 445, 447 (8th Cir. 1984); Bouta v. Am. Fed'n of State, County & Mun. Employees, 746 F.2d 453, 454 (8th Cir. 1984)).

DISCUSSION

Resolution of the motion for summary judgment involves consideration of the provisions of the Arkansas version of Article 9² of the Uniform Commercial Code, which deals with secured transactions, and the provisions of Section 552 of the Bankruptcy Code, which governs the treatment of certain security interests in a bankruptcy case.

In order to create a perfected security interest in personal property certain requirements must be met. The debtor must sign a security agreement in favor of the secured party which grants a security interest to the secured party, and that agreement must contain an adequate description of the collateral, value must be given between the debtor and the secured party, and the debtor must have rights in the collateral. Ark. Code Ann. § 4-9-203(1) (a)-(c) (Michie Supp. 1999); In re Endicott, 239 B.R. 529, 531 (Bankr. E.D. Ark. 1999) (citing Ark. Code Ann. § 4-9-203 (1) (a)-(c) (Michie Supp. 1997)); Rice v. Fas Fax Corp. (In re Hot Shot Burgers & Fries, Inc.), 169 B.R. 920, 925 (Bankr. E.D. Ark. 1994); Bank of Yellville v. Scott (In re Scott), 113 B.R. 516, 519 (Bankr. W.D. Ark. 1990)).

Under Arkansas law, a security interest may be created in after-acquired property of a debtor. A security agreement that provides for a security interest in after-acquired property is valid and will create a security interest when the debtor acquires rights in the collateral and all of the other requirements for creating a security interest have been met. River Valley Bank v. Ace Sports Management (In re Sports Management, LLC), 271 B.R. 134, 145-46

²Arkansas Act 2001, No. 1439 constitutes the new version of Article 9 of the Uniform Commercial Code, which by its terms became effective in Arkansas July 1, 2001. The transaction in question, however, is governed by the provisions of Article 9 that were effective prior to July 1, 2001, because all of the relevant events occurred before that date.

(Bankr. E.D. Ark. 2001) (citations omitted). A security interest in after-acquired property is perfected when it has attached and the applicable steps for perfection have been performed. Ark. Code Ann. § 4-9-303(1) (Michie 1991); Bank of the West v. Commercial Credit Fin. Serv., Inc., 852 F.2d 1162, 1166 (9th Cir. 1988); In re Ace Sports Management, 271 B.R. at 146 (citations omitted).

The proper way to perfect a security interest in benefits from government farm programs is to follow the provisions of Article 9 of the Uniform Commercial Code as outlined herein. Kingsley v. First Am. Bank, 865 F.2d 975, 981 (8th Cir. 1989)(government payments are accounts or general intangibles under Article 9); In re Endicott, 239 B.R. at 531 (where steps for attachment and perfection of a security interest were accomplished under Article 9, creditor had perfected security interest in farm program benefits); In re Waters, 90 B.R. 946, 968 (Bankr. S.D. Iowa 1988) (where government deficiency payments were listed as collateral in the security agreement, lender held security interest under Article 9); In re Sunberg, 35 B.R. 777, 781 (Bankr. S.D. Iowa 1983)(right to government farm payment was general intangible under UCC), *aff'd*, 729 F.2d 561 (8th Cir. 1984).

Consideration of the Bank's motion for summary judgment also requires construction of section 552 of the Bankruptcy Code, which provides in relevant part as follows:

(a) Except as provided in subsection (b) of this section, property acquired by the estate or by the debtor after the commencement of the case is not subject to any lien resulting from any security agreement entered into by the debtor before the commencement of the case.

(b)(1) Except as provided in sections 363, 506(c), 522, 544, 545, 547, and 548 of this title, if the debtor and an entity entered into a security agreement before the commencement of the case and if the security interest created by

such security agreement extends to property of the debtor acquired before the commencement of the case and to proceeds, product, offspring, or profits of such property, then such security interest extends to such proceeds, product, offspring, or profits acquired by the estate after the commencement of the case to the extent provided by such security agreement and by applicable nonbankruptcy law, except to any extent that the court, after notice and a hearing and based on the equities of the case, orders otherwise.

11 U.S.C. § 552(a)-(b)(1) (2000).

The evidence submitted in support of the motion for summary judgment is not sufficient to show whether or not the Bank holds a perfected security interest in the payments. Trustee's Exhibit A indicates that the government payments are property of Jerry Toombs, Jr. The combination promissory note and security agreement, however, was signed "Toombs Farms" by Jerry Toombs Sr., Jerry Toombs, Jr., and by Penny Toombs. (Bank Ex. A.) The financing statement also indicates the debtor in the secured transaction to be Toombs Farms. It is not clear from the exhibits filed whether Toombs Farms is a corporation, partnership or trade name of the Debtors.


Therefore, a fact question remains unanswered as to whether the note, security agreement and financing statement were executed by Jerry Toombs and Penny Toombs individually or in a representative capacity on behalf of an entity named Toombs Farms. Resolution of this question is necessary before it can be determined whether the debtor in the secured transaction had rights in the collateral so that the Bank's security interest attached.

See In re Ace Sports Management, Inc., 271 B.R. at 145 (a security interest in after-acquired

property is perfected when it attaches and all steps of perfection have been accomplished).³

Because the motion for summary judgment leaves material facts still unresolved, the motion for summary judgment is denied.

IT IS SO ORDERED.


U.S. BANKRUPTCY JUDGE
DATE: Sept. 25, 2002

cc: David D. Coop, Esq., Trustee
A. Jan Thomas, Esq.
R. Bryant Marshall, Esq.
Gwendolyn Hodge, Esq.
Debtors

³The case law addressing the proceeds issue raised by the Bank is in conflict. However, the Eighth Circuit Court of Appeals has issued several opinions on the subject of whether various types of government payments are proceeds pursuant to section 552(b). See, e.g., Bank of Ark. v. Owens (In re Owens), 884 F.2d 330, 334 (8th Cir. 1989) (government dairy termination payments, except as to sale of cows, were not proceeds under Article 9); In re Kingsley, 865 F.2d at 979 (federal diversion and deficiency payments are not proceeds under North Dakota law). See also Lovald v. Great Plains Prod. Cred. Ass'n (In re Frasch), 53 B.R. 89, 90-91 (Bankr. S.D. 1988 (government milk diversion payments were not covered by security agreement granting security interest in livestock and proceeds). The Eighth Circuit has not specifically held on the issue of whether disaster payments are proceeds.