

**United States Bankruptcy Court  
Western District of Wisconsin**

Cite as: [Unpublished]

**In re Denise Carrie Penrose, Debtor**  
Bankruptcy Case No. 91-00882-7

United States Bankruptcy Court  
W.D. Wisconsin, Eau Claire Division

October 10, 1991

Van Buren Wake, Jr., for the debtor.  
Roger Deffner, for ITT Financial Services.

Thomas S. Utschig, United States Bankruptcy Judge.

**MEMORANDUM OPINION, FINDINGS OF FACT,  
AND CONCLUSIONS OF LAW**

This matter comes before the Court on the motion of the debtor to avoid a lien of ITT Financial Services (ITT). ITT holds a security interest in certain household items of the debtor. This includes a sofa, coffee table, entertainment center, television set, dresser, mattress, bed foundation, box spring and bed headboard. The debtor is Denise Carrie Penrose and she is represented by Van Buren Wake, Jr. ITT is represented by Roger Deffner.

The aforementioned items were purchased by the debtor on June 7, 1990, from Mirman's Home Furnishings Co., Wausau, Wisconsin (Mirman's). They were purchased under a "90 days same as cash" purchase contract for \$2,167.39. The sales contract grants a security interest to the "Seller," identified on the bottom of the form as Mirman's. The contract also contains the statement that "[s]eller intends to assign (sell) this contract to ITT Financial Services or one of its affiliates." See Creditor's Exhibit No. 1 at 1. The parties agree that the security interest was a purchase-money security interest but dispute to whom it was initially granted.

The back of the contract contains provisions for assignment of the contract. These provisions provide in part that "[s]eller assigns this contract, its security interest and all its rights under the contract to the proposed Assignee named on the front." See Creditor's Exhibit No. 1 at 2. As noted, the assignee named on page 1 of the contract was ITT or one of its affiliates. A copy of the original of the contract contains, in the assignment section, the signature of Mary M. Borchardt, Credit Manager for Mirman's, dated June 6, 1991, the same date the debtor signed the contract.

ITT paid the balance of the debtor's account (\$2,167.39) with Mirman's by check No. 5326 45629 on June 18, 1990. The debtor later signed a promissory note with ITT on September 19, 1990, thereby converting the ninety-day note into an installment contract. This note states that the purchase-money security interest in the

household items is retained. See Creditor's Exhibit No. 3 at 1.

Testimony at the hearing revealed that the debtor had filled out a "Buyer's Statement" (Creditor's Exhibit No. 4) at Mirman's on May 12, 1990. The information contained in this statement was then allegedly phoned in to ITT on May 14, 1990, and transferred to a credit worksheet. The application was approved by ITT that same day and Mirman's was notified of the approval. It was allegedly in reliance on ITT's approval (and its resultant guarantee of payment by ITT to Mirman's) that Mirman's executed the "90 days same as cash" agreement with the debtor on June 7, 1990.

The debtor asserts that the refinancing of the purchase price by her with ITT Financial Services on September 18, 1990, constituted a novation of her original obligation with Mirman's. Since a novation occurred, the debtor continues, the purchase-money security interest granted to Mirman's was extinguished. For support, the debtor cites In re Richardson, 47 B.R. 113 (Bankr. W.D. Wis. 1985). In Richardson, a farmer made a small down payment on a Ford tractor and the ultimate purchase of the tractor was made contingent upon the availability of financing. The debtors obtained credit from Ford Motor Company Credit (FMCC) and made several more down payments on the tractor before signing a retail installment contract with FMCC. Before taking possession of the tractor, however, the debtors obtained other financing from a private third party and used a small portion of this money to make an additional payment on the tractor. Shortly thereafter the debtors paid off FMCC from loan proceeds from the private third-party lender. 47 B.R. at 113-14.

The private third-party lender in Richardson argued that the purchase-money security interest (PMSI) of FMCC was not extinguished when the debtors paid off FMCC's retail installment contract. Rather, the third-party lender argued, the PMSI in the tractor was acquired by it since the refinancing constituted a mere renewal and not a novation. 47 B.R. at 117.

The Bankruptcy Court for the Western District of Wisconsin did not agree with the third-party lender. It held that

[w]here a third party . . . advances money to the debtor which is applied to the balance of the original note, the original lender is paid off and completely drops from the picture. . . . The effect then is to create a novation rather than a renewal of the original obligation, and the PMSI is extinguished.

47 B.R. at 118.

The debtor in this case asserts that here too the original lender, Mirman's, dropped from the picture upon her refinancing with ITT and thus a novation occurred. The Court is not persuaded by the debtor's arguments and finds her reliance on Richardson unconvincing as applied to the present facts.

In Richardson, the court noted specifically that the down payment made with the third-party lender's funds was not a prerequisite to the debtor's acquiring possession of the tractor. 47 B.R. at 116. The third-party lender thus did not "[e]nable the debtor to acquire rights in or the use of collateral . . . ." <sup>(1)</sup> Id. at 116-17. It was through FMCC's granting of credit that the debtor acquired rights in the collateral. Id. The court further held that since the parties to the original agreement had changed in the subsequent refinancing, a renewal could not have occurred. Id. at 117-18.

In the Richardson case, therefore, there was no connection whatsoever between

the original lender (FMCC) and the private third-party lender. Here, however, there is a significant nexus between Mirman's and ITT. The testimony showed that it was only after ITT's approval of the debtor's "Buyer's Statement" that Mirman's was willing to enter into the "90 days same as cash" contract with the debtor. That contract, moreover, specifically states that "[Mirman's] intends to assign (sell) this contract to ITT Financial Services or one of its affiliates." See Creditor's Exhibit No. 1 at 1. In addition, the back of the contract contains the assignment of contract by Mirman's to ITT. This assignment was executed the same day as the sale -- June 7, 1990. See Creditor's Exhibit No. 1 at 2. Arguably, therefore, there was really only one "original" lender here -- ITT -- since Mirman's acceptance of the debtor for the ninety-day term was contingent on ITT's prior approval of the debtor's application.

Nevertheless, the Court finds that Mirman's had a PMSI in the collateral -- by virtue of the terms of the "90 days same as cash" contract with the debtor. Given the close connection between Mirman's and ITT from the very beginning of the transaction at issue here, the Court finds that the refinancing with ITT on September 19, 1990, did not constitute a novation. See generally Clark, The Law of Secured Transactions Under the Uniform Commercial Code, para. 3.09[2][a] at 3-94 (2nd ed. 1988). The PMSI of Mirman's carried through the refinancing in September to ITT. Even though ITT did not pay Mirman's until June 18 -- 11 days after the debtor took possession -- that payment was made pursuant to ITT's approval of the debtor's Buyer's Statement, which occurred before the debtor took possession of the collateral.

The facts of this case are similar to a case discussed by the Richardson court -- Thet Nah & Associates, Inc. v. First Bank of North Dakota (NA), Minot, 336 N.W. 2d 134 (N.D. 1983). In that case the court held that a third-party bank lender acquired a PMSI in the collateral even though it paid the original lender off after the debtor had required rights in the collateral. The court reached this result on the basis of the fact that the third-party lender had committed itself to give credit to the debtor prior to the debtor's taking possession of the collateral. 336 N.W.2d at 138.

The debtor's reliance on two other cases, In re Moody, 97 B.R. 605 (Bankr. D. Kan. 1989) and In re King, 19 B.R. 409 (Bankr. M.D. Ga. 1982) is likewise unconvincing under the present facts. In Moody, there was no connection whatsoever between the original lender, a finance company, and the subsequent lender, a bank. The subsequent loans from the bank, moreover, included additional sums of money borrowed by the debtor above and beyond the amount of the original obligation to the finance company. 97 B.R. at 606. King involved numerous refinancing agreements between the debtor and the original lender, a bank. These subsequent refinancing agreements involved numerous new and different security agreements, payoffs of separate prior debts of the debtor with the bank, and the advancement of additional sums of money to the debtor. 19 B.R. at 410-11.

As noted previously, the refinancing that occurred here involved a financing company with a close nexus to the original seller before and at the time the debtor acquired rights in the collateral. In addition, the refinancing that occurred here did not involve new or additional collateral, nor did it involve the advancement of additional sums of money (other than additional interest in the original obligation). The Moody and King cases are therefore factually distinguishable and inapplicable here.

The only fact that is helpful to the plaintiff-debtor's case here is that she may have been unaware of the exact relationship between ITT and Mirman's and the specific details of ITT's role in approving credit for the original purchase at Mirman's. The testimony was unclear as to this point. Nevertheless, as noted, ITT Financial

Services is referenced as an assignee on the original "90 days same as cash" contract that the debtor signed with Mirman's. The mere fact that the debtor may have been unaware of ITT's role at the time of purchase, without more, is therefore insufficient to rescue her claim.

The Court finds that the PMSI granted to Mirman's survived the subsequent refinancing with ITT Financial Services. The debtor, therefore, cannot avoid the lien of ITT Financial Services pursuant to 11 U.S.C. § 522(f). Accordingly, the debtor's motion to avoid the lien of ITT is denied.

This decision shall constitute findings of fact and conclusions of law pursuant to Bankruptcy Rule 7052 and Rule 52 of the Federal Rules of Civil Procedure.

**END NOTE:**

1. A PMSI is defined in the Wisconsin statutes as follows:

[a] security interest is a "purchase money security interest" to the extent that it is:

(1) Taken or retained by the seller of the collateral to secure all or part of its price; or

(2) Taken by a person who by making advances or incurring an obligation gives value to enable the debtor to acquire rights in or the use of collateral if such value is in fact so used.

WIS. STAT. ANN. § 409.107 (West 1964)