

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

Cite as: [Unpublished]

**In re Harvey Alfred Dearth and  
Katherine Josephine Dearth, Debtors,  
and  
Delbert Alva Dearth, Debtor**  
Bankruptcy Case No. 89-01302-7 (Consolidated)

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

January 21, 1992

Michael V. Salm, for the debtors.  
Joan D. Eloranta, for Elmer and Hilda Dearth.  
Alan L. Billings, for State Bank of Withee.

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 Delbert and Harvey Dearth to avoid a lien of Elmer and Hilda Dearth. The collateral at issue is the proceeds from the sale of a 7700 Ford tractor. The tractor was sold at auction on August 20, 1991, for \$9,000. Two objections were filed to the motion of Delbert and Harvey Dearth -- by Elmer and Hilda Dearth and by the State Bank of Withee. The debtors are Harvey and Katherine Dearth and Delbert Dearth and they are represented by Michael V. Salm. (Katherine Dearth is now deceased.) Elmer and Hilda Dearth are represented by Joan D. Eloranta and the State Bank of Withee by Alan L. Billings.

The objection by the State Bank of Withee was settled by stipulation. A hearing on the objection by Elmer and Hilda Dearth was held in Eau Claire, Wisconsin, on December 23, 1991. After hearing evidence and testimony, the Court took the matter under advisement.

Although the facts of this case appear rather complex at first reading, the facts which are relevant to the matter at hand can be briefly summarized. The item of collateral originally at issue here -- the 7700 Ford tractor -- was purchased on June 27, 1981, for between \$17,000 - \$18,000 from Cherokee Garage in Colby, Wisconsin. The purchaser was David Dearth, the son of Elmer and Hilda Dearth. The purchase was financed on a short-term note with the State Bank of Withee, in Withee, Wisconsin. The purchase money security interest of the State Bank of Withee was extinguished the following month (July 1981) by payment to the bank of the remaining balance on the short-term note for the tractor. The money for the payoff of the bank was obtained pursuant to a promissory note executed by Elmer and Hilda Dearth and David and Connie Dearth with the Federal Land Bank. This note represented a refinancing of a prior loan with the Federal Land Bank as well as

an additional sum to pay off the balance due on the tractor loan and several other small loans.

Elmer and Hilda Dearth and David and Connie Dearth refinanced their obligation with the Federal Land Bank a second time on January 31, 1983. Pursuant to this refinancing, the parties granted Federal Land Bank a first mortgage on their 263-acre farm in Clark County, Wisconsin.<sup>(1)</sup>

On February 13, 1986, the aforementioned parties executed an offer to purchase in which they agreed to sell the 263-acre farm, certain farm personal property including the Ford tractor at issue and cows and heifers. The purchasers were Harvey and Katherine Dearth and Delbert Dearth. The total purchase price was \$154,800 and was apportioned as follows: real estate -- \$107,370; cattle and heifers -- \$25,285; machinery -- \$22,145. As part of the agreement, the purchasers agreed to assume the 1983 mortgage with the Federal Land Bank. The balance due on the mortgage at the time of purchase was \$81,000. The balance of the purchase price was to be paid by a 15% milk assignment with interest at a rate of 9% per annum over a five-year period.

As security, sellers Elmer and Hilda Dearth received the following: 1) a second mortgage on the real estate for the balance of the sum due on it; 2) a first lien on the cattle and machinery, pursuant to a financing statement and security agreement; and 3) a second mortgage on the Jersey cattle. It is on the basis of the first lien on the cattle and machinery that Elmer and Hilda Dearth assert that their security interest in the Ford tractor is non-avoidable. Specifically, they allege that the security interest is a purchase money security interest and thus non-avoidable pursuant to 11 U.S.C. § 522(f)(2). The debtors for their part deny that the lien is a purchase-money lien and on that basis assert that the lien is avoidable.

Turning to the applicable law, 11 U.S.C. § 522(f)(2) provides:

(f) Notwithstanding any waiver of exemptions, the debtor may avoid the fixing of a lien on an interest of the debtor in property to the extent that such lien impairs an exemption to which the debtor would have been entitled under subsection (b) of this section, if such lien is--

...

(2) a nonpossessory, nonpurchase-money security interest in any--

(A) household furnishings, household goods, wearing apparel, appliances, books, animals, crops, musical instruments, or jewelry that are held primarily for the personal, family, or household use of the debtor or a dependent of the debtor;

(B) implements, professional books, or tools, of the trade of the debtor or the trade of a dependent of the debtor; . . .

11 U.S.C. § 522(f)(2) (West 1991).

A tractor clearly falls within the language "[i]mplement . . . or tool(s), of the trade of the debtor . . .," given that the debtors are farmers. The key issue, therefore, is whether the security interest of Elmer and Hilda Dearth is a purchase money security interest so as to render it nonavoidable pursuant to § 522(f)(2).

The Bankruptcy Code does not define "purchase money security interest," but the

Uniform Commercial Code does. The relevant provision, as adopted in Wisconsin, is WIS. STAT. § 409.107, which states:

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).

Creditors Elmer and Hilda Dearth asserted at the evidentiary hearing that their security interest fits within the language of subsection (2) of the aforementioned § 409.107. They assert that, by transferring the tractor and other machinery to the debtors in return for a promissory note and security interest in those items, they in effect incurred an obligation and thereby gave value which enabled the debtors to acquire rights in the collateral. See WIS. STAT. ANN. § 409.107(2) (West 1964).

Although the scenario presented by this case does at first glance appear to fall within the purview of WIS. STAT. § 409.107(2), the Court finds that Elmer and Hilda Dearth do not have a purchase money security interest in the tractor at issue. The Court makes its finding on the basis of the "value" requirement contained in WIS. STAT. § 409.107. The Court finds that, as to the Ford tractor at issue here, Elmer and Hilda Dearth did not make an advance or incur an obligation and thereby give value which enabled the debtors to acquire rights in that tractor, as required by § 409.107. See WIS. STAT. ANN. § 409.107 (West 1964).

As to the tractor, the only "value" that was given in this case was the tractor itself. This is not the typical case under subsection (2) of § 409.107 where a third-party lender advances funds [and thereby gives "value"] to the debtor which then enables him to purchase ["acquire rights in"] the collateral. See generally Clark, The Law of Secured Transactions Under the Uniform Commercial Code para. 309[2][a] (2nd ed. 1988). The only item of collateral at issue here is the Ford tractor, and its transfer to the debtors was the only "value" given for purposes of determining the nature of any security interest in it. In order for Elmer and Hilda Dearth to have given "value" in regard to the debtors' acquisition of the Ford tractor, therefore, they would have to have had at least some interest in that tractor.

There are no documents before the Court upon which the Court could find that Elmer and Hilda Dearth had any interest in the Ford tractor, the transfer of which would constitute "giving value" for purposes of § 409.107. Nor did the parties provide any arguments at the evidentiary hearing upon which the Court could base such a finding. The evidence showed that David Dearth (Elmer and Hilda's son) purchased the tractor in June of 1981 with funds received from the State Bank of Withee on a short-term note. Less than one month later, Elmer and Hilda Dearth were co-makers with David and Connie Dearth on a promissory note with the Federal Land Bank. Part of the proceeds received as a result of this note were used by David to pay off the short-term note for the tractor with the State Bank of Withee.

The fact that Elmer and Hilda Dearth were co-makers on that promissory note, <sup>(2)</sup> without more, is insufficient upon which to base a finding that they thereby acquired

an interest in the tractor. There was no evidence presented to show that David Dearth granted any interest in the tractor to his parents at the time he paid off the first note or at anytime thereafter. Without such a grant, Elmer and Hilda did not acquire any rights in the tractor since it was purchased by their son David alone. If, by agreeing to be co-makers on the note dated July 21, 1981, Elmer and Hilda were intending to in effect loan part of the proceeds to their son to pay off the tractor, then they could have taken a security interest in that tractor or insisted on partial ownership in return for their co-signing. There is no evidence that they did so.

Because Elmer and Hilda Dearth had no interest in the Ford tractor at issue, therefore, they did not "give value" for purposes of WIS. STAT. § 409.107. They thus do not have a purchase money security interest in that tractor. The objection of Elmer and Hilda Dearth to the lien-avoidance motion of Harvey and Delbert Dearth is denied. Accordingly, the debtors' motion is granted; the lien of Elmer and Hilda Dearth on the tractor is void.

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 NOTES:**

1. Strictly speaking, Elmer and Hilda Dearth were in effect merely co-signors on the mortgage, since they had sold the farm to David and Connie Dearth in April of 1978.

2. Under the circumstances, Elmer and Hilda Dearth were most likely accommodation parties to the note, even though the note itself does not indicate such. On the "Settlement Statement" which serves to inform the Federal Land Bank of St. Paul exactly how the funds it loaned were used (it was filled out on December 11, 1981 -- approximately 5 months after the proceeds were disbursed -- by the president of the Federal Land Bank affiliate in Chippewa Falls), the "borrower" is identified as being only David Dearth. See Exhibit 3b of Elmer and Hilda Dearth.