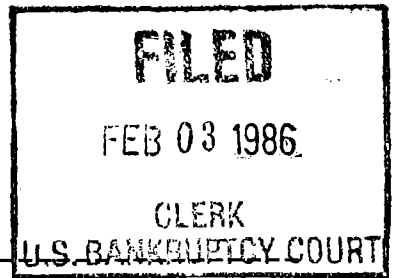


UNITED STATES BANKRUPTCY COURT
WESTERN DISTRICT OF WISCONSIN



In re:

Case Number:

ROBERT J. GASIOR
CONSTANCE L. GASIOR

EF7-84-00539

Debtors.

MEMORANDUM OPINION AND ORDER

Creditor Dairyland State Bank (DSB) has moved the court for an order determining the extent of its security interest in certain items of property possessed by debtors. Debtors argue that several of the items claimed by DSB do not come within the terms of their security agreement with DSB. Additionally, the Federal Land Bank (FLB) contends that some of the items at issue are fixtures encumbered by a prior FLB mortgage which was properly recorded.

A hearing in this matter was held October 28, 1985. The debtors appeared by Steven R. Cray, DSB by Ken Jost and Randi Osberg, and FLB by Peter C. Gunther. The parties have subsequently submitted briefs to the court.

DSB claims a security interest in certain items of property possessed by the debtor because of a financing statement filed March 16, 1982. This financing statement covers "all farm equip. now owned or [hereafter] acquired by debtor, & all accessions to, & spare & repair parts, special tools & equip. for such farm equip. All livestock and the young of all livestock now owned or

hereafter acquired by debtor. All crops growing or to be grown by debtor & the products of all such crops on property. All livestock feed and farm supplies now owned or [hereafter] acquired by debtor." DSB has a second financing statement filed August 12, 1980, covering "all cattle and machinery now owned or acquired."

The debtors assert that certain items that DSB is claiming an interest in are not covered by either of these financing statements. Specifically, the debtors argue that an air compressor, welder, table saw, gas barrel, water tank, trailer, feed scoop, and feed can are "consumer goods" and are not "equipment" or "machinery" within the meaning of Wis. Stat. § 409.109.

'Goods are: (1) "Consumer Goods" if they are used or bought for use primarily for personal, family or household purposes; (2) "Equipment if they are used or bought for use primarily in business. . . .' Wis. Stat. § 409.109.

Clearly the issue, then, is what is the primary use of these goods? Mr. Gasior gave uncontradicted testimony that the air compressor was located in the house and used for household purposes. He also stated that he worked with the welder and table saw as a hobby. Finally, Mr. Gasior testified that the gas barrel was used to store gasoline for automobiles, not farm equipment. DSB did not offer any evidence that would support the proposition that the goods were primarily used as farm equipment. Nevertheless, CSB argues that these items should be considered equipment because they are more directly related to farming use than household use. The court cannot agree. The court concludes

that the air compressor, welder, table saw, and gas barrel are consumer goods not subject to a security interest of DSB.

Several other items of dispute between debtors and DSB were, according to the testimony of Mr. Gasior, used for horses which his wife kept as a personal hobby and which were never used in the growing of crops. The bank neither discredited this testimony nor introduced contradictory evidence. It does, however, point out that horses are often considered to be livestock. Nevertheless, the facts of this case demonstrate that these horses were not used as livestock or otherwise in the farm operation. The water tank, trailer, feed scoop, and feed can are consumer goods not subject to a security interest of DSB.

The final two items in dispute by debtors and DSB are hay located in a shed and a small wood trailer. Mr. Gasior testified that the hay in the shed was grown, and the small wood trailer was built, after the filing of the bankruptcy petition. The court has no basis for doubting this assertion. These items are post-petition property not subject to the bank's security interest. 11 U.S.C. § 552(a).

DSB and the FLB are in disagreement as to the status of an auger to a bunk feeder, a bunk feeder, three silo unloaders, pipeline, and a bulk tank. The issue of dispute between the parties is whether these items have become fixtures. If the items are fixtures they would be covered by a mortgage of FLB. The mortgage coverage of the items would be superior to any later-acquired security interest of DSB.

Wisconsin courts have established a three-pronged test for determining whether an item of personal property has become a fixture. Wisconsin Dept. of Revenue v. A. O. Smith Harvestore Products, Inc., 72 Wis.2d 60, 240 N.W.2d 357 (1974). This test entails a consideration of: "1) Actual physical annexation to the real estate; 2) application or adaptation to the use or purpose to which the realty is devoted; and 3) an intention on the part of the person making the annexation to make a permanent accession to the freehold." Id. at 240 N.W.2d 360. Intent is the most important factor. Id. The relevant intent is the objective and presumed intent of a hypothetical ordinary, reasonable person. Id. at 361.

Each of the disputed items are attached in some manner to the real estate on which FLB holds a mortgage. The bunk feeder is set in concrete slab and is about 60 feet long. The auger to the bunk feeder is attached to the chute of a silo. The silo unloaders are attached to a silo with nuts and bolts. The bulk tank and pipeline are both located in the milkhouse. The pipeline leading from the bulk tank is attached to the barn in the sense that it runs through the walls. In addition to being attached in various ways to the real estate, these items are each adapted to the farm use to which the realty is devoted.

Mr. Gasior testified that he installed these items with the intent that they would become a permanent part of the farm. A hypothetical, reasonable person would intend to make these items permanent fixtures, just as Mr. Gasior testified he intended to do. DSB argues that these items should not be considered to be

fixtures because they are not essential to the farm's operation. This is not relevant. As long as the items are of practical use in a farm operation, and are put to such use, they must be considered adapted to farm use.

The court concludes that the auger to the bunk feeder, the bunk feeder, the three silo unloaders, the pipeline, and the bulk tank are fixtures covered by the FLB mortgage. These items are sufficiently attached to the real estate, although some of them could be removed without undue damage. The overriding factor is that a person's reasonable intent in installing these items would be to make them permanent fixtures.

DSB finally claims that the FLB mortgage does not cover the fixtures because it does not specifically list the fixtures. The court disagrees. It is not necessary for a mortgage to specifically list fixture items; they are part of the real estate. The mortgage of the FLB covers the fixture items discussed above. Therefore, any subsequent security interest of DSB is subordinate to this mortgage. Wis. Stat. § 409.313.

This opinion shall constitute findings of fact and conclusions of law in accordance with Bankruptcy Rule 7052.

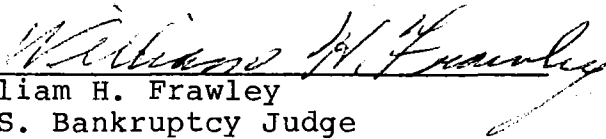
ORDER

IT IS ORDERED THAT the Dairyland State Bank does not possess a security interest in debtors' air compressor, welder, table saw, gas barrel, water tank, trailer, feed scoop, and feed can.

IT IS FURTHER ORDERED THAT debtors' auger to a bunk feeder, the bunk feeder, three silo unloaders, pipeline, and a bulk tank are fixtures covered by the Federal Land Bank mortgage.

Dated: February 3, 1986.

BY THE COURT:


William H. Frawley
U. S. Bankruptcy Judge

cc: Attorney Steven R. Cray
Attorneys Kenneth W. Jost and Randi L. Osberg
Attorney Peter C. Gunther