

the one exception of exercising its option to purchase. The value of the airplane was set in the contract to be \$330,000.

The debtor was required to pay a \$50,000 initial payment for the agreement and option to purchase and a \$15,024 payment upon delivery to represent the first and last months' payments under the lease. The \$50,000 was to be subtracted from the \$330,000 value of the airplane for the purposes of the option to purchase. The debtor could purchase the airplane at anytime during the term of the lease by satisfying this \$280,000 outstanding balance. A 13½% annual interest rate was to be calculated on the outstanding balance and was to be deducted from each monthly payment with the remainder of each monthly payment to be applied as principal payment reducing the outstanding balance. The debtor had the option to purchase by tendering the amount of this outstanding balance. Under the terms of the lease, the outstanding balance would be completely satisfied by the monthly payments as applied to principal. In fact, it appears that the debtor would have been entitled to be reimbursed \$1.54 from its last month's payment on deposit if it chose to exercise its option to purchase.

Under the terms of the agreement the debtor was required to maintain complete insurance on the aircraft. The debtor was required to keep the aircraft in good condition and bear all costs of service and repair. Also, the debtor was to pay all costs associated with licensing, permits, and storage fees.

On June 11, 1983, Tobin loaned the debtor \$100,000 which loan was evidenced by a promissory note. On July 6, 1983, Tobin

loaned the debtor \$50,000 and this loan also was evidenced by a promissory note. On June 11, 1983, Tobin and the debtor entered into a Security Agreement and on July 14, 1983, a financing statement was filed with the Secretary of State for the State of Wisconsin noting a security interest in "[a]ll property of the debtor including but not limited to debtor's equipment, machinery, inventory, accounts receivable, contract rights and airplanes." Nothing has been filed with the Secretary of Transportation noting that Tobin claims a security interest either in the airplane or in the lease-purchase agreement.

The debtor filed a voluntary bankruptcy petition pursuant to 11 U.S.C. Chapter 11 on January 31, 1985. The Chapter 11 proceeding was converted to a Chapter 7 proceeding on May 7, 1985, and the trustee was appointed. The trustee sold the airplane and asks the court for guidance in distributing the proceeds. The trustee argues that the contract is a conditional sales contract and any security interest in said contract must be properly filed with the Secretary of Transportation in order to be valid. Tobin argues that he possesses a security interest in the equity of the debtor in the lease agreement between the debtor and Golden. He further alleges that this security interest is properly perfected by the filed financing statement with the Secretary of State for the State of Wisconsin.

The threshold question relates to the nature of the interest the debtor possesses in the aircraft. The debtor was required to pay the full value of the airplane under the terms of the "lease

agreement" and had the option of becoming the owner upon compliance with the terms of the contract. This is a conditional sale as defined by the Federal Aviation Act. 49 U.S.C. § 1301(19). The debtor does not simply have a lease but has an ownership interest in the airplane itself.

The Federal Aviation Act quite clearly requires that any instrument that affects the ownership interest of an aircraft must be filed for recordation in order to be valid. 49 U.S.C. § 1403(c). Tobin is claiming a security interest in the debtor's ownership interest in the airplane and, therefore, his interest must be filed for recordation with the Secretary of Transportation in order to be valid. 49 U.S.C. § 1403.

Tobin argues that the debtor is the person "by whom the instrument was made or given" and, therefore, Tobin's security interest is excepted from the general rule and does not have to be recorded in order to be valid. This argument ignores the fact that the trustee assumes the position of a lien creditor under the Bankruptcy Code. 11 U.S.C. § 544. In order for Tobin's security interest to be valid as to the trustee it must have been filed with the Secretary of Transportation. In re Pegasus International Travel Club, 15 B.R. 842 (Bankr. M.D. Pa. 1981).

Finally, Tobin argues that he could not file with the Secretary of Transportation because the debtor's agreement with Golden was not filed. Golden was still the record owner of the airplane and the debtor did not have a record interest in the airplane. Tobin alleges that he relied on the debtor's equity

interest in the airplane when he loaned the money and that he did everything he could to perfect his security interest in the airplane. The court finds this argument unpersuasive. Tobin should have realized his precarious position with respect to his security at the time of executing the loan. He could have required the debtor to record the lease agreement as a condition of the loan. He failed to do this and the Federal Aviation Act requires that his interest be filed before it is valid.

49 U.S.C. § 1403.

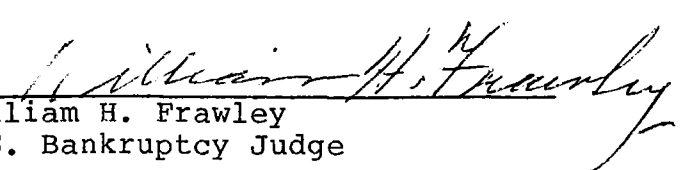
This opinion shall constitute findings of fact and conclusions of law in accordance with Bankruptcy Rule 7052.

ORDER

NOW, THEREFORE, IT IS ORDERED THAT the claim of James C. Tobin to the proceeds of the sale of the DeHavilland airplane is hereby denied and his status with request to such proceeds is that of an unsecured creditor.

Dated: March 17, 1986.

BY THE COURT:



William H. Frawley
U.S. Bankruptcy Judge

cc: Attorney Lawrence J. Kaiser
Attorney Jeffrey W. Guettinger
Attorney Don E. Whinnery *ca*