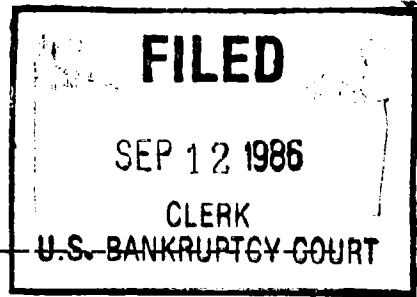


N/M

UNITED STATES BANKRUPTCY COURT
WESTERN DISTRICT OF WISCONSIN



In re: Case Number:
MAR-REN, LTD., EF7-85-00276
Debtor. ORDER

The court having this day entered its memorandum opinion, findings of fact, and conclusions of law;

NOW, THEREFORE, IT IS ORDERED that the Trustee's motion to authorize compromise and settlement is hereby denied.

IT IS FURTHER ORDERED that the Valley Bank of Menomonie's motion requesting relief from stay and abandonment of the debtor's causes of action against Ford for breach of the dealership agreement contract is hereby granted.

IT IS FURTHER ORDERED that the Valley Bank of Menomonie shall pursue the claims of the debtor against Ford for violation of the dealership agreement and Chapter 218 of the Wisconsin Statutes that are in the nature of tort, and shall turn the proceeds of such claims, after deducting the cost of litigation, over to the trustee.

Dated: September 12, 1986.

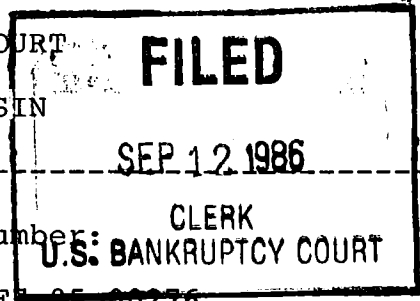
BY THE COURT:

- cc: Atty. Peter Herrell *PH*
- Atty. Brian McGrath *PH*
- Atty. Jon Christiansen *PH*
- Robert E. Willow *PH*
- Atty. Roger Gierhart *PH*
- Atty. Kenneth Axe *PH*
- Atty. William Schroeder *PH*
- Atty. Thomas Schumacher *PH*

William H. Frawley
William H. Frawley
U.S. Bankruptcy Judge

9/12/86

UNITED STATES BANKRUPTCY COURT
WESTERN DISTRICT OF WISCONSIN



In re:
MAR-REN, LTD.,

Case Number
EF 85 00276

Debtor.

MEMORANDUM OPINION,
FINDINGS OF FACT, AND CONCLUSIONS OF LAW

The Trustee, Peter F. Herrell, appears for himself and has submitted to the court an application for approval of a compromise agreement with Ford Motor Company and Ford Motor Credit Company (referred to collectively hereinafter as Ford). This agreement is with respect to several causes of action that the debtor may have against Ford for the circumstances surrounding the termination of a dealership agreement. Ford appears by Brian W. McGrath and Jon P. Christiansen. Bob Willow Motors appears by Robert E. Willow and objects to the compromise agreement. Attorney Roger Gierhart has filed an objection to the compromise agreement. The Valley Bank of Menomonie (VBM) appears by Kenneth B. Axe and William A. Schroeder and objects to the compromise agreement.

There is a second matter that is presented for determination to the court. VBM has applied for relief from the 11 U.S.C. § 362 automatic stay with respect to the causes of action that the debtor has against Ford. VBM has a security interest in the

general intangibles of the debtor. It is asserted that the mentioned causes of action constitute general intangibles. VBM requests the trustee to abandon the debtor's claims against Ford to VBM in order that VBM may pursue the lawsuits against Ford. 11 U.S.C. § 554. The trustee does not oppose such abandonment if the court finds that VBM has a perfected security interest in the lawsuits.

A trial was held on these matters on June 23, 1986. The relief from stay issue was briefed by the parties along with the issue concerning settlement. This memorandum opinion addresses the facts and legal issues involved with both the motion seeking relief from stay and the motion seeking approval of the settlement agreement.

The debtor filed for relief under Chapter 11 of the Bankruptcy Code on February 15, 1986. The case was converted to Chapter 7 of the Bankruptcy Code on February 15, 1986. One of the assets of the bankruptcy estate is the debtor's causes of action against Ford for termination of a dealership agreement contract in violation of the contract and in contravention of Chapter 218 of the Wisconsin Statutes. The trustee offers for approval a compromise agreement that would release these causes of action to Ford for the amount of \$15,000.00. The three objecting creditors allege that this is an insufficient amount.

On July 11, 1983, the debtor filed a complaint against Ford with the Commissioner of Transportation alleging the wrongful termination of a dealership agreement. The Commissioner issued a

final order on March 12, 1985, finding that Ford violated Chapter 218 of the Wisconsin Statutes. Ford petitioned the Dane County Circuit Court for review of the Commissioner's decision. The decision of the Commissioner was reversed by the Circuit Court on September 23, 1985. The debtor has appealed the decision of the Circuit Court to the Court of Appeals, District IV. The briefs have all been filed in that appeal and the parties are awaiting the court's decision. It is alleged that this suit may yield as much as \$500,000.00 for the bankruptcy estate. The debtor has also initiated a diversity action in Federal District Court for treble damages and attorney fees under § 218.01(9) of the Wisconsin Statutes. It is alleged that this suit may yield as much as \$3,000,000.

The court has read the briefs and reviewed the record with respect to the proffered settlement agreement. It is apparent that the lawsuits against Ford are for a substantial amount of money. Three of the major creditors of the debtor object to the settlement agreement. It is the conclusion of the court that Ford's meager offer of \$15,000.00 is insufficient to warrant approval by the court of the settlement agreement.

The court next must address the issue of whether VBM should be granted relief from stay. VBM alleges that it possesses a perfected security interest in the debtor's causes of action against Ford for breach of the dealership contract. Ford argues that VBM does not and could not have a security interest in the debtor's causes of action against Ford.

The debtor entered into a dealership agreement with Ford on July 27, 1981. On January 26, 1983, the debtor executed a security agreement granting VBM a security interest in, among other things, "all general intangibles now owned or hereafter acquired by Debtor."¹ The filed financing statement with respect to this security agreement stated that it covered the following types of property:

All accounts receivable, inventory, parts inventory, used car inventory, tools, equipment, furniture, fixtures, equipment now owned and hereafter acquired and all general intangibles and all proceeds thereof.

Ford argues that the financing statement does not have an after-acquired property clause pertaining to general intangibles and, therefore, VBM does not have a perfected security interest in the debtor's causes of action against Ford. This argument is without merit. The security agreement clearly grants VBM a security interest in general intangibles now owned or hereafter acquired. A financing statement does not have to contain an after-acquired property clause in order to perfect a security interest in after-acquired property. In re Wells, (Bankr. W.D. Wis. Adv. #85-0290,

¹ all inventory and documents relating to inventory now owned or hereafter acquired by Debtor, including all goods held for sale, lease or demonstration or to be furnished under contracts of service, goods leased to others, trade-ins and repossessions, raw materials, work in process and materials or supplies used or consumed in Debtor's business;

all accounts, contract rights, chattel paper and instruments now owned or hereafter acquired by Debtor;

all equipment and fixtures now owned or hereafter acquired by Debtor;

all general intangibles now owned or hereafter acquired by Debtor;

July 7, 1986); James Falcott, Inc. v. Franklin National Bank, 292 Minn. 277, 194 N.W.2d 775 (1972).²

Ford argues that the causes of action the debtor has against Ford were not sufficiently choate at the time the security agreement was entered into to effect a valid granting of a security interest. The court disagrees. VBM has a perfected security interest in the debtor's general intangibles. Causes of action are clearly general intangibles. Wis. Stat. § 409.106. It is also well established that it is possible to grant a security interest in after-acquired property. Wis. Stat. § 409.204(1). The official comment to § 9-106 of the Uniform Commercial Code explicitly states that "[t]his Article rejects any lingering common law notion that only rights already earned can be assigned." Official Comment U.C.C. § 9-106.

The debtor entered into a dealership agreement contract with Ford on July 27, 1981. This agreement created certain contract rights on behalf of the debtor. These contract rights are general intangibles. Wis. Stat. § 409-106. One of the debtor's rights under the dealership contract was an action for breach of contract if Ford failed to comply with the terms and conditions of the dealership agreement. The debtor granted VBM a security interest in its general intangibles on January 26, 1983. This security interest was properly perfected by a filed financing

² "There is no need to refer to after-acquired property or future advances in the financing statement." Official Comment to U.C.C. § 9-204.

statement. Hence, VBM's security interest extends to the causes of action the debtor has against Ford for breach of contract.

Ford argues that the debtor's causes of action against Ford are in the nature of tort and not assignable. Generally, the Article of secured transactions applies to any transaction intended to create a security interest in general intangibles. Wis. Stat. § 409.102(1)(a). An exception to this general rule is with a transfer of a claim arising out of tort. Wis. Stat. § 409.104(11). The issue, then, revolves around the determination of whether the causes of action the debtor has against Ford are in the nature of breach of contract or are in the nature of tort. A tort has been defined as, "[a] private or civil wrong or injury, other than breach of contract, for which the court will provide a remedy in the form of an action for damages." (emphasis added) Black's Law Dictionary, 1335 (5th ed. 1979); Prosser and Keeton, The Law of Torts, 2 (5th ed. 1984). Breach of contract is defined as, "[f]ailure, without legal excuse, to perform any promise which forms the whole or part of a contract. Prevention or hindrance by party to contract of any occurrence or performance requisite under the contract for the creation or continuance of a right in favor of the other party or the discharge of duty by him." Black's Law Dictionary, 171 (5th ed. 1979).

The debtor has alleged that Ford breached its dealership agreement contract with the debtor. By definition, a breach of contract is not a tort. The debtor actually has several different causes of action against Ford for violation of the dealership

contract and for violation of Chapter 218 of the Wisconsin Statutes. The main cause of action is between the two parties to the contract for failure to perform a part of the contract, and is clearly in the nature of breach of contract. It is clear that the facts and circumstances involved in the several causes of action are inextricably intertwined. However, it is also clear that VBM has a perfected security interest in the debtor's cause of action against Ford for breach of contract.

VBM is not attempting to claim a security interest in any of the causes of action that the debtor has against Ford that may be in the nature of tort. VBM has offered to litigate any tort claims against Ford in conjunction with the claims for breach of contract. VBM will then turn over to the bankruptcy estate, after deducting costs of litigation, the proceeds of that portion of the judgment that relate to tort claims.

By this method, VBM offers to finance the lawsuits that the debtor might not be able to pursue due to its lack of resources. It would also further the interests of judicial economy to resolve both the breach of contract claims and the tort claims at the same time.

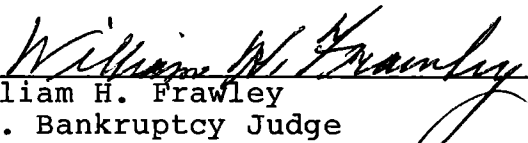
It is the conclusion of the court that VBM has a properly perfected security interest in the debtor's causes of action against Ford for breach of contract. These causes of action should be abandoned by the bankruptcy estate so that VBM can pursue the litigation. 11 U.S.C. § 554. Several of the causes of action the debtor has against Ford may be in the nature of tort.

The court will allow VBM to pursue these tort actions with the proviso that, after the costs of litigation, all proceeds from these causes of action that are in the nature of tort must be turned over to the bankruptcy estate.

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

Dated: September 12, 1986.

BY THE COURT:



William H. Frawley
U.S. Bankruptcy Judge