

FILED

JUL 08 1986

UNITED STATES BANKRUPTCY COURT  
WESTERN DISTRICT OF WISCONSIN

CLERK  
U.S. BANKRUPTCY COURT

In re:

Case Number:

ROBERT P. WELLS

EF11-85-00925

Debtor.

FIRST NATIONAL BANK  
OF BALDWIN,

Plaintiff,

Adversary Number:

v.

85-0290-11

UNITED LEASING, c/o Polfus  
Implement,

Defendant.

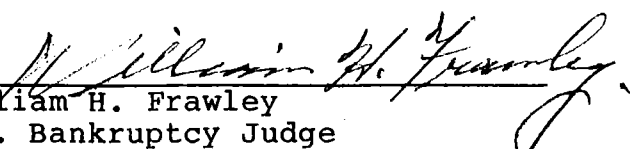
ORDER

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

NOW, THEREFORE, IT IS HEREBY ORDERED THAT the First National  
Bank of Baldwin's security interest in the John Deere 7700  
combine, John Deere 843 corn head, John Deere 4640 tractor, John  
Deere 3010 tractor, and John Deere 4020 tractor has priority over  
the security interest of United Leasing.

Dated: July 8, 1986.

BY THE COURT:

  
William H. Frawley  
U.S. Bankruptcy Judge

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FIRST NATIONAL BANK  
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MEMORANDUM OPINION,  
FINDINGS OF FACT, AND CONCLUSIONS OF LAW

The First National Bank of Baldwin (FNBB), by Thomas Schumacher, has initiated this adversary proceeding requesting the court to determine the relative priority of certain security interests in property of the debtor. United Leasing c/o Polfus Implement (Polfus) appears by Michael Schwartz, and asserts that its security interest should be given priority. The First National Bank of New Richmond (FNBNR) appears by L. R. Reinstra and argues that its security interest should be given priority. A trial was held in this proceeding on May 1, 1986, and the issues have been submitted for determination by briefs.

In April of 1969 the debtor entered into a written security agreement with FNBB wherein the debtor granted FNBB a security interest in all farm equipment now owned or hereinafter acquired. FNBB filed a financing statement perfecting this security interest on April 16, 1969.<sup>1</sup> Subsequently the debtor purchased the various items of equipment that are the subject of this dispute from Polfus. These items include a John Deere 7700 combine, a John Deere 843 corn head, a John Deere 4640 tractor, a John Deere 3010 tractor, and a John Deere 4020 tractor. Polfus obtained a purchase money security interest in each of the acquired items of equipment and perfected these security interests with filed financing statements. Polfus then assigned its contract with the debtor and its security interests to John Deere. Subsequently, FBNBR perfected a blanket security interest in the farm equipment of the debtor by filing a financing statement on May 28, 1980.

In 1983 Polfus was informed by John Deere that the debtor's accounts with John Deere were delinquent and that a replevin action would be commenced unless such accounts were brought up to date. Polfus then issued a check on June 8, 1983, in the sum of \$127,712.20 to John Deere to pay off the contractual obligations

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<sup>1</sup> FNBB's security agreement contained an after-acquired property clause; however, its financing statement did not contain such a clause. It has been held that the financing statement does not need to have an after-acquired property clause to perfect a security interest in after-acquired property. James Falcott, Inc. v. Franklin National Bank, 292 Minn. 277, 194 N.W.2d 775 (1972).

owed by the debtor to John Deere. Polfus took the precaution of filing a financing statement on June 7, 1983, to protect its security interest in the equipment. Polfus apparently had expected John Deere to assign the security interest it possessed in exchange for payment of the accounts; however, John Deere filed termination statements instead of assignments.

Prior to issuing the check of June 8, 1983, to John Deere, Polfus telephonically contacted FNBB and FBNBR to inform them of its intentions. There was extensive testimony introduced at trial concerning what was discussed in these respective conversations. As can be expected, the parties disagreed as to what was actually discussed in the conversations that took place over three years ago. There is no dispute that such conversations actually took place. Apparently a representative of FNBB informed Polfus that FNBB would not assert a security interest superior in priority to the security interest that would be assigned to Polfus.

(5) In all cases not governed by other rules stated in this section (including cases of purchase money security interests which do not qualify for the special priorities set forth in subs. (3) and (4)), priority between conflicting security interests in the same collateral shall be determined according to the following rules:

(a) Conflicting security interests rank according to priority in time of filing or perfection. Priority dates from the time a filing is first made covering the collateral or the time the security interest is first perfected, whichever is earlier, provided that there is no period thereafter when there is neither filing nor perfection.

(b) So long as conflicting security interests are unperfected, the first to attach has priority.

Wis. Stat. § 409.312(5). FNBB filed its financing statement on April 16, 1969. It was determined that FNBB's security interest has priority over FBNBR's security interest by the Order of the Circuit Court for St. Croix County, State of Wisconsin, dated in September of 1984, Case No. 84 CV 282. Polfus filed its financing statement on June 7, 1983. Clearly FNBB's security interest has priority under § 409.312(5) of the Wisconsin Statutes.

Polfus argues that FNBB subordinated its security interest in the telephone conversations during May of 1983. The court disagrees.

409.316 Priority subject to subordination. Nothing in this chapter prevents subordination by agreement by any person entitled to priority.

Wis. Stat. § 409.316. Only a person entitled to priority can actually subordinate its interests. At the time of the conversations in May of 1983, it was contemplated by both parties that Polfus was going to obtain an assignment of the purchase money security interests from John Deere. The purchase money security interest had priority status and it would have been impossible for FNBB to subordinate its security interest to it. Even if it could be said that FNBB agreed to subordinate its interest to the purchase money security interest, it cannot be said that FNBB

subordinated its security interest to the subsequently acquired security interest that Polfus now possesses.

Next, Polfus asserts that FNBB should be estopped from asserting its security interest under the doctrine of promissory estoppel.

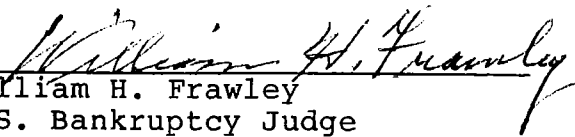
Promissory estoppel. That which arises when there is a promise which promisor should reasonably expect to induce action or forbearance of a definite and substantial character on part of promisee, and which does induce such action or forbearance, and such promise is binding if injustice can be avoided only by enforcement of promise. "Moore" Burger, Inc. v. Phillips Petroleum Co., Tex., 492 S.W.2d 934.

Black's Law Dictionary, 1093 (5th ed. 1979). This argument is without merit. At the time of the conversation in May of 1983, the parties were contemplating that Polfus would receive an assignment of the purchase money security interest. FNBB agreed not to assert an interest superior to the purchase money security interest. FNBB did not agree to subordinate its interest to Polfus' subsequently acquired security interest. It is also apparent that Polfus did not reasonably rely on FNBB's representation. If Polfus had intended to enter into a subordination agreement it was sophisticated enough to have such an agreement in writing. Instead of a promise the agreement was in reality an acknowledgement of how the law of secured transactions works. It is the conclusion of the court that FNBB has the priority security interest with respect to the equipment that is the subject of this dispute.

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

Dated: July 8, 1986.

BY THE COURT:

  
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William H. Frawley  
U.S. Bankruptcy Judge