

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE SOUTHERN DISTRICT OF ILLINOIS

IN RE:) In Proceedings
) Under Chapter 7
MANUEL and PATRICIA ROMERO,)
) BK No. 93-50643
Debtor(s).)
) Adv. No. 94-5007
LAURA K. GRANDY, Trustee))
)
Plaintiff,)
VS.)
)
)
FLOYD BLAINE, JR. and)
HENRY EUGENE BLAINE,)
)
Defendants.)

OPINION

On March 4, 1994, the chapter 7 trustee filed a complaint under 11 U.S.C. § 544 seeking to avoid an allegedly unperfected security interest that defendants claim in certain restaurant equipment which they sold to debtors pursuant to an installment sales contract. The relevant facts are as follows:

Di Romero House, Inc. entered into a written lease of the premises at 500 Lewis and Clark Boulevard, East Alton, Illinois on May 1, 1989 and began to operate a restaurant and lounge. Those premises were owned by B & B Enterprises, a partnership whose partners are the defendants, Floyd Blaine, Jr. and Henry Eugene Blaine. Di Romero House, Inc. is a corporation whose sole shareholders and officers are the debtors, Manuel and Patricia Romero. On May 1, 1989, debtors and defendants executed an installment sale contract pursuant to which debtors purchased personal property and equipment from the defendants for use in the

restaurant. The contract provided, in part, as follows:

3. Assignment of Title. Upon payment in full as herein provided Sellers shall provide Buyers with a Bill of Sale for such equipment and personal property. Until such time as Sellers are required to execute the Bill of Sale hereunder the title to the equipment and personal property described herein shall not pass to Buyers but shall remain in Sellers.

4. Location of Equipment and Personal Property. Until all payments are made as provided herein by Buyers to Sellers, the equipment and personal property identified herein shall not under any circumstances, without the prior written consent of Sellers be removed from the premises at 500 Lewis and Clark Boulevard East Alton, Madison County, Illinois.

Installment Sale of Equipment, ¶¶ 3 & 4.

On August 20, 1993, a notice of default was served on Di Romero House, Inc. for failure to make payments under the installment sale contract. A notice of termination with respect to the underlying lease was served on the same date. Debtors filed a chapter 7 bankruptcy proceeding on August 27, 1993.¹

In her complaint, the trustee contends that the Installment Sale of Equipment Contract is really a financing arrangement and that defendants failed to properly perfect their security interest in the equipment. Specifically, the trustee alleges that no security agreement was ever executed between debtors and defendants and that defendants did not file a UCC-1 financing statement with the Illinois Secretary of state. The trustee asks that the Court declare void any

¹Di Romero House, Inc. had filed a chapter 11 proceeding on May 17, 1993. That case was converted to a chapter 7 proceeding on or about July 14, 1993.

interest defendants may claim in the equipment and that the property be turned over to the trustee for the benefit of the bankruptcy estate.

In their answer, defendants admit that no security agreement was executed and that no UCC-1 financing statement was filed. Defendants further state that no such documents were required for this transaction and that "the equipment referred to in the Complaint was to remain within the premises owned by the defendants and not to be removed from their possession." Answer to plaintiff's complaint, ¶¶ 5 & 6.

The trustee filed a motion for summary judgment in which she argues that there are no factual issues and that she is entitled to judgment as a matter of law. She specifically contends that in their Answers to Plaintiff's Request for Admission of Facts and Genuineness of Documents and Interrogatories, defendants (1) admit to the accuracy of the installment sale contract, (2) admit that this was the only document executed in the transaction, (3) admit that no financing statements were filed, and (4) admit that the debtors had possession of the equipment and inventory described in the Installment Sale of Equipment Agreement.

Summary judgment is appropriate only if "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed.R.Civ.P. 56(c).

Article Nine of the Illinois Uniform Commercial Code provides that "[a] financing statement must be filed to perfect all security interests except ... a security interest in collateral in possession of

the secured party under Section 9-305." 810 ILCS 5/9-302. Section 305 provides that "[a] security interest in letters of credit ... goods, instruments (other than certificated securities), money, negotiable documents or chattel paper may be perfected by the secured party's taking possession of the collateral." 810 ILCS 5/9-305.²

Defendants contend that a factual dispute exists respecting whether debtors or defendants had possession of the equipment. The Court agrees. Despite the trustee's contention to the contrary, defendants expressly denied, in their Answers to Plaintiff's Request for Admission of Facts, that debtors had possession of the equipment and inventory described in the installment contract.³ Furthermore, in response to plaintiff's question asking defendants to identify the location of the equipment, defendants replied:

Whereabouts unknown. Some is in the possession of Bob Metzger, the owner of Midtown Restaurant, some is in storage location unknown. Some is at Casablanca Restaurant at the Bethalto Airport and some is in the possession of the Firemen's Union Bingo parlor in the Eastgate Shopping Center, East Alton, Illinois.

²Goods are defined as including "all things which are movable at the time the security interest attaches or which are fixtures...." 810 ILCS 5/9-105. "Goods are ... 'equipment' if they are used or bought for use primarily in business...." 810 ILCS 5/9-109.

³In Plaintiff's Request for Admission of Facts and Genuineness of Documents and Interrogatories, Request No. 4 states:

Admit that the Debtor was in possession of said equipment at the time of the filing of the bankruptcy herein.

RESPONSE: Denied.

Defendants' Answers to Plaintiff's Request for Admission of Facts and Genuineness of Documents and Interrogatories, Interrogatory No. 6.

Since Article Nine of the Uniform Commercial Code provides that a secured party may perfect its security interest by possession, it is necessary for the Court to determine who had possession of the equipment at the time the bankruptcy petition was filed. This factual determination cannot be made based on the pleadings and documents now before the Court. Furthermore, preliminary research indicates that possession is not defined in Article Nine, and that the Court must consider various factors, including who exercised dominion and control over the property, in resolving the question of possession. In the instant case, for example, the following questions may be relevant:

- (1) How much control did the defendants exercise over the premises where the equipment was located?
- (2) How much control did the debtors exercise over the equipment?
- (3) Did defendants seize the property after serving debtors with the notice of default and prior to the filing of the bankruptcy petition?⁴

⁴The installment sale contract provided that in the event of a default by the Buyers, "Sellers may elect to immediately retake possession of the equipment and personal property herein identified and retain as liquidated damages any payments made hereunder." Installment Sale of Equipment, ¶ 9.

Case law holds that an unperfected secured party who seizes collateral for the purpose of disposing of it after the debtor's default also perfects its security interest. See Matter of Vitreous Steel Products Co., 911 F.2d 1223, 1233 (7th Cir. 1990) (secured party perfected its security interest by repossessing collateral prior to the filing of the bankruptcy petition). See also 1A Secured Transactions Under the Uniform Commercial Code, § 6A.03[2][c] at 6A-28 (1994).

In light of the unresolved factual dispute concerning possession of the collateral, summary judgment is inappropriate at this time. Accordingly, IT IS ORDERED that the trustee's motion for summary judgment is DENIED. The trial on the complaint remains scheduled for August 15, 1994 at 9:00 a.m. in East St. Louis, Illinois.

/s/ Kenneth J. Meyers
U.S. BANKRUPTCY JUDGE

ENTERED: July 28, 1994