



### FINDINGS OF FACT

1. Debtors filed a Chapter 11 petition on February 12, 1988.
2. On April 19, 1978, Debtors sold 240 acres of land on contract to the Timmins Bros. Partnership.
3. On February 7, 1986, Debtors assigned their contract right to receive payments to Bank. Shortly thereafter, Bank recorded the assignment in the Washington County Recorder's office but did not file a financing statement in the Iowa Secretary of State's office.
4. On December 18, 1987, a final decree and judgment was entered in favor of assignee Bank pursuant to its petition to foreclose its security interest in the assignment of contract.

### DISCUSSION

The ruling on Debtors' application to use cash collateral depends upon the ruling on the application to set aside assignment and void lien. As a result, the Court will address the assignment/lien avoidance application first.

#### I. Application to Set Aside Assignment and Void Lien

The issue facing the Court is whether a security interest in the proceeds from an assigned real estate contract must be filed in the office of the Iowa Secretary of State in order to be perfected. Debtors argue the assignment of a vendor's interest in a contract for sale of real estate creates a security interest in personal property which may be perfected only by filing a financing statement in the office of the Iowa

Secretary of State. See Iowa Code §554.9401(1)(c). Debtors further argue that since Bank did not make any U.C.C. filing upon receiving the assignment, Bank's security interest in the proceeds from the real estate contract is unperfected. Therefore, Debtors believe they can set aside the assignment and void the lien under 11 U.S.C. §545(2) as an unperfected security interest.

Bank, on the other hand, argues the assignment of a vendor's interest in a contract for the sale of real estate is a "transfer of a lien on real estate," and therefore outside the scope of Article 9. See Iowa Code §554.9104(j). Bank further argues that since it did record the assignment with the Washington County Recorder, its security interest in the real estate contract proceeds is perfected, thus making §545(2) inapplicable.

As a preliminary matter, the Court believes Debtors have addressed the wrong lien avoidance provision in the Bankruptcy Code. Debtors moved to avoid lien pursuant to 11 U.S.C. §545(2). Said section deals with unperfected statutory liens. A statutory lien is defined as "arising solely by force of a statute on specified circumstances or conditions...but does not include security interest or judicial lien." 11 U.S.C. §101 (47) (emphasis added). The lien in question is a security interest.

Thus, by its very terms, section 545(2) does not apply.

Given that section 545(2) is inapplicable, the Court believes Debtors' motion to avoid lien falls under section 544(a). Said section is the strong-arm provision which gives to the trustee the rights of a hypothetical judicial lien creditor and hypothetical bona fide purchaser of real estate which are superior to the rights of an unperfected security interest holder. Since Debtors want to avoid an alleged unperfected security interest, the Court will address the motion under section 544(a).

In researching this issue, the Court has not located nor has counsel cited any Iowa case law on point. However, as Bank correctly points out, both Minnesota and Wisconsin law have been interpreted with respect to this issue and, in both cases, the court held that Article 9 perfection is not required under the circumstances similar to those in the case at bar.

In the case of In re Schuster, 784 F.2d 883 (8th Cir. 1986), the court construed Minnesota law and held that the assignees of a vendor's interest in a contract for deed perfected their interest in the contract by recording the assignments in the office of the county recorder, pursuant to

Minnesota recording laws, even though they did not file a financing statement in the Secretary of State's office pursuant to Article 9 of the U.C.C. The Schuster court

pointed out that under Minnesota law, the vendor of land sold by contract for deed retains legal title to the realty until the vendee has made all the required payments, and during that time, the vendee has an equitable interest subject to divestment for failure to perform contract obligations. Id. at 884. Therefore, since the vendor had legal title at the time of the assignment, the court concluded the transaction involved a "transfer of an interest in real estate" under §336.9-104(j) of Minnesota Statutes Annotated (West Supp. 1985) (counterpart of §104(j) of Article 9). Id. The court further noted that as a practical matter, persons tracing the history of title to land would not expect to examine records in the Office of the Secretary of State, but rather would search in the county recorder's office in the county where the land is located. Id. at 884-85.

In the case of In re Hoepfner, 49 B.R. 124 (Bankr. E.D. Wis. 1985), the court held that under Wisconsin law, the assignment of the land contract vendor's interest is not subject to Article 9 filing requirements. The court noted that even though a land contract vendor holds a personal property interest

in the land by virtue of the doctrine of equitable conversion, said interest is also "an interest in or lien on real estate" within Wisconsin Statutes section 409.104(10) (counterpart of §104(j) of Article 9). Id. at 127. The court stated:

A mortgage debt, although a chose in action, is yet where the subject of the security is land, 'an interest in land', and priorities are governed by the rules applicable to interest in land, and not by the rules which govern interest in personalty.

Id. (quoting Burke v. Hoffman, 28 N.J. 467,\_\_\_\_, 147 A.2d 44, 49 (1958)). The court further noted that parties tracing the history of title in land are not expected to examine the records in the Secretary of State's office but rather will customarily go to the Register of Deeds office where real estate conveyances are routinely recorded. Id.

While Shuster and Hoepfner are not binding precedent, the Court views them as persuasive authority. The identical Article 9 section (104(j)) interpreted in both cases is codified at section 554.9104(j) of the Iowa Code. Just like Wisconsin in Hoepfner, a land contract vendor in Iowa holds a personal property interest under the doctrine of equitable conversion. See Briley v. Madrid Improvement Co., 255 Iowa 338, \_\_\_\_ 122 N.W.2d 824, 827, (1963). Similarly, the vendor's interest, notwithstanding its conversion to personalty, continues to

constitute a lien upon the subject real estate. See Harrington v. Feddersen, 208 Iowa 564, \_\_\_\_, 226 N.W. 110, 112 (1929). Furthermore, as in Minnesota and Wisconsin, parties tracing the history of title and land in Iowa search in the County Recorder's office, not in the Secretary of State's office. See Iowa Code §558.11.

Given the similarities between the state law in all three states and the lack of any Iowa case law on point, the Court will follow the holdings in both Shuster and Hoepfner. As a result, the Court holds a transaction involving the assignment of a land contract vendor's interest in land is a "transfer of an interest in or lien on real estate" within the meaning of section 554.9104(j) of the Iowa Code. As a result, Article 9 is inapplicable and the assignee can perfect its interest by recording the assignment in the office of the county recorder in the county in which the land is located, pursuant to Iowa Code section 558.11.

In the case at bar, assignee Bank did record the assignment with the County Recorder in Washington County. Therefore, since Bank's interest was properly perfected, Debtors cannot set aside the assignment and void the lien under 11 U.S.C. §544(a).

## II. Application to Use Cash Collateral

Given that Bank's interest in the contract proceeds is perfected, Debtors' application to use cash collateral is moot.

Section 363(c) allows for the use of cash collateral, provided the cash collateral is property of the estate. The contract payments in question are not property of the estate because Debtors assigned their rights in such to Bank which then properly perfected its security interest in such. The only way said payments could be property of the estate is if Debtors were successful in setting aside the assignment and avoiding the lien thereon. See 11 U.S.C. §551. Since the Court has ruled Debtors cannot set aside the assignment and avoid lien thereon because Bank's interest is properly perfected, the payments are not property of the estate, thus making section 363(c) inapplicable.

#### CONCLUSION AND ORDER

WHEREFORE, based on the foregoing analysis, the Court concludes Debtors' assignment to Bank of its interest in land is a "transfer of an interest in or lien on real estate" under section 554.9104(j) of the Iowa Code, thus making U.C.C. Article 9 inapplicable.

Further, Bank perfected its interest by recording the assignment in the Washington County Recorder's office. As a result, the contract payments are not property of the estate, thus making section 363(c) inapplicable.

IT IS ACCORDINGLY ORDERED that Debtors' application to set aside assignment and void lien is denied.



IT IS FURTHER ORDERED that Debtors' application to use cash collateral is denied.

Dated this \_\_\_\_\_ day of November, 1988.

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RUSSELL J. HILL  
U.S. BANKRUPTCY JUDGE