

UNITED STATES BANKRUPTCY COURT
For the Southern District of Iowa

In the Matter of
STEPHEN D. SHUGER and
JOANNE N. SHUGER,

Case No. 87-2184-C H

Debtors.

Chapter 7

WILTON SAVINGS BANK,

Plaintiff,

Adv. No. 87-0227

v.

STEPHEN D. SHUGER, JOANNE M.
SHUGER and A. FRED BERGER,
Trustee,

Defendants.

JUDGMENT

The issues of this proceeding having been duly considered by the Honorable Russell J. Hill, United States Bankruptcy Judge, and a decision having been reached,

IT IS ORDERED AND ADJUDGED that the Bank does not have a perfected security interest in Shuger's trust interest because the parties never intended to create a security interest in the trust. The Bank's complaint is dismissed.

Dated this 14th day of April, 1989.

Mary M. Weibel
Clerk of U.S. Bankruptcy Court

By: _____
Deputy Clerk

SEAL OF U.S. BANKRUPTCY COURT

ENTRY OF JUDGMENT

Dated: April 14, 1989

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**ORDER--TRIAL ON COMPLAINT TO DETERMINE VALIDITY,
PRIORITY OR EXTENT OF LIEN FOR OTHER INTEREST IN PROPERTY**

On September 16, 1988, a trial was held on the complaint to determine validity, priority or extent of lien or other interest in property. The following attorneys appeared on behalf of their respective clients: H. Raymond Terpstra II for Plaintiff Wilton Savings Bank (hereinafter "Bank"); H. J. Dane for Defendant Trustee A. Fred Berger; and David Scieszinski for Defendant Debtors (hereinafter "Debtors"). Also appearing was A. Fred Berger, Chapter 7 Trustee. At the conclusion of said trial, the Court took the matter under advisement upon a briefing deadline of October 14, 1988. Briefs were timely filed and the Court considers the matter fully submitted.

This is a core proceeding pursuant to 28 U.S.C. §157(b)(2)(K). The Court, upon review of the pleadings, arguments of counsel, evidence presented, and briefs submitted, now enters its findings and conclusions pursuant to Fed.R.Bankr. 7052.

FINDINGS OF FACT

1. On August 31, 1986, Debtors filed a voluntary joint Chapter 7 petition.
2. Debtors have been engaged in farming since 1973, and have received agricultural financing from Bank since 1976.
3. On May 20, 1983, Edward Cohen created an irrevocable inter vivos non-spendthrift trust in the amount of \$17,366.84. Debtor Stephen Shuger (hereinafter "Shuger") is the primary beneficiary of said trust and Bank is the trustee of said trust.
4. Under the terms of said trust, Shuger was to be paid the net income accumulated at the end of each six-month period. The trust further provided that on May 23, 1988, it would terminate and the corpus thereof and any accumulated and undistributed net income would be paid over to Shuger, if then living.
5. On May 15, 1986, Shuger signed a \$125,000 promissory note with Bank. Said note was secured by security agreements dated June 14, 1985, and March 20, 1986, which granted Bank a security interest in, among other things, Shuger's "general

intangibles, whether now owned or hereafter acquired and wherever located."

6. The bank officer responsible for establishing the trust was also the bank officer who initially interviewed Shuger and helped prepare Debtors' financial statements, security agreements and financing statements. There was no suggestion made by Bank at the time that the trust be included as an asset on Shuger's financial statements.

7. There were several meetings between Shuger and Bank. Various assets were discussed but at no time did Shuger and Bank discuss the trust, although the corpus of the trust was deposited with Bank. Thereafter, Shuger never listed his interest in the trust as an asset on any of the financial statements he prepared for Bank. In addition, said interest was not specifically referred to in Bank's security agreement or financing statement.

8. Shuger had "Rec Check" which is a recordkeeping service offered by Bank. Shuger's Rec Check revealed interest proceeds from the trust to Shuger. Bank used Shuger's Rec Check records to prepare cash flow projections.

9. Bank claims a security interest in Shuger's interest in said trust by virtue of Shuger's granting of a security interest to Bank in all of Shuger's "general intangibles."

10. Shuger and Trustee argue Bank does not have a security interest in Shuger's trust interest because the

parties never intended that Bank's security interest would cover Shuger's interest in the trust.

DISCUSSION

The issue in this case is whether Bank has a perfected security interest in Shuger's interest in a non-spendthrift trust by virtue of its security interest in Shuger's "general intangibles, whether now owned or hereafter acquired."

In determining whether the parties' security agreements cover Shuger's interest in the trust, the Court must make a two-step inquiry. See In re Bossingham, 49 B.R. 345, 349 (S.D.Iowa 1985) citing J. White & R. Summers, Uniform Commercial Code, §23-3 at 904-05 (2d Ed. 1980)); In re Owensboro Canning Co., Inc., 46 B.R. 607, 609 (Bankr. W.D. Ky. 1985) (same). The Court must first resolve as a question of law whether the language in the written security agreement objectively indicates that the parties may have intended to create a security interest. Bossingham, 49 B.R. at 349, Owensboro Canning, 46 B.R. at 610. In determining whether a security interest does arise from the writing, the Court should look for "buzzwords" such as "collateral," "pledge," "to secure," "security," or assignment language. J. White & R. Summers, Uniform Commercial Code §24-3, 301 (3d Ed. 1988). Absent such language in the writing, the objective test is not met and the writing fails. Id.

In the case at bar, the language of the parties' security agreement clearly evidences a security interest in "general

intangibles." This raises the question of whether the term "general intangibles" includes a beneficial interest in the trust. "General intangibles" is broadly defined as including "any personal property (including things in action) other than goods, accounts, chattel paper, documents, instruments and money." Iowa Code §554.9106 (1987). A beneficial interest in a land trust is a general intangible. Heritage Standard Bank & Trust Co. v. Heritage Standard Bank & Trust Co., as Trustee, 3 U.C.C. Rep Serv 439 (Ill. App. Ct. 1986) (emphasis added) (under Illinois law, treated as personal property and recognized as a general intangible under Illinois version of U.C.C. Article 9). Given the broad definition and analogous case law, the Court believes Shuger's beneficial interest in the trust is properly classified as a "general intangible" under Iowa Code §554.9106. Thus, for purposes of the objective inquiry, the Court concludes the parties' security agreement can reasonably be construed to include the trust interest.

The second inquiry the Court must make is a factual determination of whether the parties actually intended to create a security interest. In re Padgett, 49 B.R. 212, 215 (Bankr. W.D. Ky. 1985); Owensboro Canning, 46 B.R. at 610; see also In re Metzler, 405 F.Supp. 622, 625 (N.D. Ala. 1975) ("The fundamental requirement of meeting of the minds is inherent in such agreements, as it is in all contracts. Without a contract there can be no security interest."). The

creditor has the burdeh of establishing the intention to create a specific security interest. Metzler, 405 F.Supp. at 625. Parole evidence is admissible to determine said intention. See In re Lockwood, 16 U.C.C. Rep Serv 195, 200 (Bankr. D. Conn. 1974) ("Parole evidence is admissible to reveal the actual negotiations of the parties in arranging the transaction and any supplemental oral discussions of the parties which demonstrate their true intentions and understanding of the transaction.") The key question is what did the debtor agree to? Metzler, 405 F.Supp. at 625.

In the case at bar, the evidence clearly indicates the parties never actually intended to create a security interest in Shuger's trust interest. The parties' security agreement is labeled an "Agricultural Security Agreement" which evidences an intent to include agricultural items as collateral, and the parties never thought about the trust interest as either an asset or collateral. In addition, the bank officer responsible for establishing the trust was also the bank officer who initially interviewed Shuger and helped prepare the Debtors' financial statements, security agreements and financing statements. There was no suggestion made by Bank at the time that the trust be included as an asset on Shuger's financial statements. Furthermore, at no time did the parties discuss the trust, and Bank did not rely upon the trust as collateral. Thus, for purposes of the subjective inquiry, the Court concludes Bank has failed to meet its

burden of establishing the parties' intention to create a security interest in Shuger's trust interest.

CONCLUSION AND ORDER

WHEREFORE, based on the foregoing analysis, the Court concludes Bank does not have a perfected security interest in Shuger's trust interest because the parties never intended to create a security interest in the trust.

IT IS ACCORDINGLY ORDERED that Bank's complaint is dismissed.

Dated this *14th* day of April, 1989.

RUSSELL J. HILL
U.S. BANKRUPTCY JUDGE