UNITED STATES BANKRUPTCY COURT
For the Southern District of Iowa

In re:	**:**	**Case No. 02-06385-DH**
MICHAEL F. COLE and	**:**	
STACEY K. COLE,	**:**	
	:	**Chapter 7**
Debtors.	**:**	

ORDER— 1. MOTION FOR RELIEF FROM STAY AND OBJECTION THERETO; 2. MOTION TO AVOID LIEN AND/OR MOTION TO REDEEM AND OBJECTION THERETO; 3. OBJECTION TO EXEMPTION AND RESISTANCE THERETO

On December 20, 2002, the court conducted a preliminary telephone hearing on Ray Williams Enterprises, Inc.'s Motion for Relief From Stay in the above captioned case. After counsel for the debtors represented that they intended to file motions to avoid liens and to redeem property, the court set the matter down for a final hearing to be held in conjunction with lien avoidance and redemption motions. Debtors were granted until December 30, 2002, to file said motions, and any objections were to be filed seven days from the filing of the motions. The court ordered the stay to remain in place until further order of the court.

The Motion to Avoid Lien and/or Redeem Property and Objection Thereto and the Motion for Relief from Stay and Objection Thereto came on for hearing on January 7, 2003. Jerrold Wanek represented Michael F. Cole and Stacey K. Cole (hereinafter collectively Debtors). Thomas H. Burke represented Roy Williams Enterprises, Inc. (hereinafter Williams). At the conclusion of the hearing, the court took the matters under advisement.

On January 13, 2003, Mazzitelli Financing, L.C. (hereinafter Mazzitelli), claiming to be a successor in interest to Williams, filed an Objection to Debtors' Stated Exemptions and Request for Evidentiary Hearing. This matter and Debtors' objection thereto came on for hearing on March 7, 2003. Jerrold Wanek represented Debtors, and Thomas H. Burke represented Mazzitelli. At the conclusion of the hearing, the court took the matter under advisement on a briefing schedule. Post-hearing briefs have been received, and the court considers the matter fully submitted.

As each of these matters arise in the same case and concern the same property interests, the court will issue a single decision resolving the issues. The court has jurisdiction of these matters pursuant to 28 U.S.C. §§ 157(b)(1) & 1334 and order of the United States District Court for the Southern District of Iowa pursuant to 28 U.S.C. § 157(a). These are a core matters pursuant to 28 U.S.C. § 157(b)(2)(B), (G), & (O). Upon review of the pleadings, evidence, and arguments of counsel, the court now enters its findings and conclusions pursuant to Fed. R. Bankr. P. 9014 and 7052.

FINDINGS OF FACT

1. Debtors filed a joint petition for bankruptcy relief pursuant to chapter 7 of title 11 on November 19, 2002.

2. On Schedule B – Personal Property, Debtors scheduled two lists of machinery, fixtures, equipment, and supplies used in business. Debtors identified one list as "Coralville Store Inventory" valued at $7,500.00 and the other as "Iowa City Store Inventory" valued at $6,500.00. Debtors included the statement that each list of property was appraised as a "Domino's Pizza Equipment Pack."

3. The Coralville Store Inventory included the following items:

2 Ovens Middlebury Marshall
6 ft. warming rack
8 ft. Deerfield makeline
Canopy Hood Vent
2 Stainless Steel Counters
2 pan racks
2 filing cabinets
open sign
3 large trash cans
hot bag shelf w/15 heated bags
National Systems Computer system
5 terminal monitors
Lucent Phone System
Call Sequencer
8 x 10 walk in cooler
3 surveillance cameras
misc. small wares
3 compartment sink
12" screens
14" screens
16" screens
100 12" pans
100 14" pans
100 12" lids
100 14" lids
security camera system
2 printers
3 dunnage racks
2 red carryout metal chairs
5 car top signs

4. The Iowa City Store Inventory included the following items:

Phone System – AT & T Sprint
Computer CTX 300
Call Sequencer #SC02660
3 surveillance cameras
surveillance monitor
2 carryout chairs
autocheeser
make line – Bob Wood
4 make line covers
2 sneeze guards
cut table 8 ft.
over shelf for cut table
Ovens
  Middleby Marshal PS360
  Middleby Marshal PS360T
  Middleby Marshal PS360T
Hood Vent
Heat Rack
Walk In Cooler
Uniform shirts
11 Uniform jackets
10 aprons
mop
mop bucket
5 trash cans
Coke machine
18 Hot bags
29 11" screens
88 12" screens
147 14" screens
35 12" pans
618 14" pans
31 12" lids
624 14" lids
3 window wings car signs
4 ft. stainless table
2 ft. stainless table
hand sink
mop sink
5 metal shelving
safe
drop box
driver's table
cordless phone
3 compartment sink
14 Dunnage racks
2 pan racks
2 file cabinets
VCR
street map
CPU
3 printers
6 monitors
2 scales

2 Office chairs	12 stadium hot bags
Electronic calculator	A/C unit - Arcoair
18 10" screens	

5. Debtors claimed each list of property as exempt in the full amount of the stated value pursuant to Iowa Code § 627.6(10).

6. On Schedule D – Creditors holding Secured Claims, Debtors scheduled Ray Williams Enterprises, Inc. holding a claim in the amount of $275,000.00 secured by the property identified above.

7. On June 1, 1999, Michael Cole and Ray Williams Enterprises, Inc. (hereinafter Williams, Inc.) entered into an Asset Purchase Agreement whereby Cole would acquire a Domino's Pizza retail carry-out and home delivery pizza store, store number 1755, located at 889 22nd Ave. Coralville, Iowa (hereinafter # 1755). Pursuant to the agreement, Williams, Inc. agreed to sell all the equipment, including but not limited to all ovens, refrigeration units, tools, and utensils; all furniture and other furnishings; all interior and exterior leasehold improvements including but not limited to all counters, storage units, wall coverings, and signs; all inventories of food and beverages; all other supplies and inventory including but not limited to carry-out containers and paper [g]oods(?); all employee uniforms; and the cash till on hand. The items included in the sale were identified as those belonging to Williams, Inc. and used in connection with # 1755 and /or located on the premises on April 26, 1999, or on the date of the closing. Excluded from the assets sold were accounts receivable including all reimbursements, rebates, and other payment due from Domino Pizza Inc. and insurers; and the Domino's Pizza franchise assets such as the trademarks, tradenames, and the franchise agreement.

8. The agreement set the purchase price of the assets at $175,000.00. Michael Cole also agreed to pay an amount equal to the invoice cost for the food and beverage inventory, plus an amount equal to the cash tills and pay a prorated share of the prepaid operating expenses.

9. On July 5, 1999, Michael Cole executed a promissory note in the amount of $175,000.00 to Williams, Inc. The note provided that it was executed and delivered in connection with the June 1, 1999, asset purchase agreement between the parties. The note also contained the statement: "Payment of the Indebtedness by the debtor is secured by a certain Security Agreement, date as of the Execution Date hereof, between Debtor and Payee (as the secured party thereunder)." Michael Cole signed the promissory note. Stacey Cole signed a personal guaranty of the promissory note.

10. Michael Cole entered into a security agreement with Williams, Inc. in conjunction with the promissory note and on the same date. The agreement granted Williams, Inc. a security interest in the following collateral: all accounts receivable, notes receivable, and other rights to payments for goods sold or services rendered, whether now existing or hereafter arising; all inventory, supplies, and goods owned as of or subsequent to the closing date; all furniture, fixtures, machinery, equipment, tools, leasehold improvements, vehicles, and all other tangible personal property owned as of or subsequent to the closing date; all accessions, parts, attachments, accessories, and appurtenances to the aforementioned property owned as of or subsequent to the closing date; all licenses, contract rights (except the SFA?), instruments, choses in action, rights to refunds (of taxes or otherwise), and all other intangible rights and properties owned, existing, or arising as of or subsequent to the closing date; any and all proceeds (of sale, insurance, or otherwise),

replacements, substitutions, additions, improvements, products, and accessions to or of the aforementioned properties owned as of or subsequent to the closing date.

11. On July 8, 1999, a financing statement was filed with the Iowa Secretary of State identifying Michael Cole as the debtor and Williams, Inc. as the secured creditor. Michael Cole signed the financing statement.

12. The financing statement indicated that it covered the following list of property:

Y	Phone System	35	11" screens
Y	Computer	150	12" screens
Y	Call Sequence (socode) serial no. SG 02651	32	14" screens
Y	Surveillance cameras (3)	202	12" pans
Y	Surveillance monitor (serial no. 7030336)	51	14" pans
Y	Carryout chairs (2)	125	12" lids
N	Menu board	50	14" lids
5 ft	Length of phone counter	6	Cartop signs
N	Auto Cheeser	4	Window wings
Y	Makeline – Delfield (serial no. 80302M)		2' stainless steel table
N	Makeline covers		2-4' stainless steel table
Y	Sneezeguard		5' stainless steel table
6 ft	Length of cut table		6' stainless steel table
Y	Over shelves for cut table	1	Hand sink
2	Ovens	1	Mop sink
	MM PS360 B302A001-000	2	Shelving
	MM PS360 B301A001-000	1	Safe
1	Hood/fanVent	Y	Drop boxes
1	Heat rack/route stand	Y	Driver's table
	Walk-in cooler — Vollrath 9 x 7	N	Security system
2	Racks in walk-in	N	Washer/dryer
N	Sub makeline	Y	3 compartment sink
	Uniform shirts	Y	Dish drying rack
11	Uniform jackets	1	Dry good shelves
8	Aprons	4	Drainage racks
1	mop	1	Pan rack
1	mop bucket	2	file cabinets
3	trash cans	1	VCR/TV s.n. 511996
1	Coke machine	Y	street map
20	Hot bays	Y	200 mb disk
2	Steel hot boxes	4	Computer cables

2	Office chairs	Y	CPU
1	Electronic calculator	2	printers
18	10" screens	6	monitors
		3	order stations terminals

13. On July 5, 1999, Stacey Cole executed a promissory note in the amount of $100,000.00 to Williams, Inc. The note provided that it was executed and delivered in connection with the June 1, 1999, asset purchase agreement between the parties. The purchase agreement involved the Domino's Pizza store, store number 1757, located at 1911 Broadway St., Iowa City, Iowa, (hereinafter # 1757). The note also contained the statement: "Payment of the Indebtedness by the debtor is secured by a certain Security Agreement, date as of the Execution Date hereof, between Debtor and Payee (as the secured party thereunder)." Stacey Cole signed the promissory note. Michael Cole signed a personal guaranty of the promissory note.

14. Stacey Cole entered into a security agreement with Williams, Inc. in conjunction with the promissory note and on the same date. The agreement is substantially the same as the agreement that Michael entered into with Williams, Inc. and granted a security interest in the same types of collateral.

15. On November 11, 1999, Stacey Cole entered into an asset purchase agreement with William's Inc. to purchase the assets of the Domino's Pizza Store, store number 1750, located at 529 S. Riverside Dr., Iowa City, Iowa (hereinafter # 1750). On the same day, Stacey also executed a promissory note in the amount of $160,000.00, and entered into a security agreement with Williams, Inc. in conjunction with the note. Both documents were substantially the same as the previously described notes and security agreements.

16. On March 7, 2000, a financing statement was filed with the Iowa Secretary of State identifying Stacey Cole as the debtor and Williams, Inc. as the secured creditor. Stacey Cole signed the financing statement.

17. The financing statement indicated that it covered the following list of property:

1 Phone System - AT & T Sprint
1 Computer - CTX 300
1 Call Sequencer #SC02660
3 Surveillance cameras
1 Surveillance monitor
2 Carryout chairs
1 Autocheeser
1 Make line - Bob Wood #FEEH-0050-IAA-201
4 Make line covers
2 Sneeze guards
1 Cut table - 8 Ft
1 Over shelf for cut table
Ovens
  Middleby Marshal PS360 HRO-C518
  Middleby Marshal PS360T HRO-O516
  Middleby Marshal PS360T HRO-O517
1 Hood Vent
1 Heat Rack
1 Walk-in cooler - McQuary MA41196
4 Uniform shirts
11 Uniform jackets
10 aprons
1 mop
1 mop bucket
5 trash cans
1 Coke machine
18 Hot bags
Steel hot boxes - 24 small ones, 6 big ones
2 Office chairs
Electronic calculator
18 10" screens
29 11" screens
88 12" screens
147 14" screens
35 12" pans
618 14" pans
31 12" lids
624 14" lids
3 window wings car signs
1 4 ft. stainless table
1 2 ft. stainless table
1 Hand sink
1 Mop sink
5 metal shelving
1 Safe
1 Drop box
1 Driver's table
1 Cordless phone
1 3 compartment sink
14 Dunnage racks
2 Pan racks
2 File cabinets
VCR #85169097
1 Street map
1 CPU
3 Printers
6 Monitors
2 scales
12 stadium hot bags
A/C unit - Arcoair L950445135

18. On April 26, 2001, Williams, Inc. entered into an agreement with Mazzitelli, L.C. to obtain financing in the amount of $100,000.00. In exchange for the funds, Williams, Inc. assigned all of its rights, title, and interests in the three Cole promissory notes to Mazzitelli. Williams, Inc. also assigned all of its rights, title, and interest in the Cole security agreements and financing statements to Mazzitelli. Further, Ray Williams personally guaranteed payment of the three promissory notes should the Coles fail or refuse to perform their obligations under the notes.

19. On May 7, 2001, the assignment of the financing statement was filed with the Iowa Secretary of State showing the assignment of one of Williams, Inc.'s financing statements covering the Domino Pizza stores owned by Debtors to Mazzetilli.

20. On June 26, 2002, the assignment of the financing statement was filed with the Iowa Secretary of State showing the assignment of the second of Williams, Inc.'s financing statements covering the Domino Pizza stores owned by Debtors to Mazzetilli.

21. Sometime prior to Williams Inc.'s assignment of the promissory notes to Mazzetilli, Debtors closed store # 1757. Debtors continued to make payments on the promissory note associated with this store.

22. Williams Inc. filed a motion for relief from stay on November 27, 2002.

23. On December 20, 2002, Debtors filed motions to avoid liens or redeem the property identified in paragraphs 3 and 4 above. They gave notice that any objections to the motion must be filed within seven days of the filing of the motion as ordered by the court at the hearing held on December 20, 2002. The certificate of service shows notice given to Williams, Inc. at 5616 Riverbed Blvd., Baton Rouge, LA 70820 and to Mazzitelli at 2300 S. Duff, Ames, IA 50010.

24. Williams Inc. filed objections to Debtors' motions on January 3, 2003. Mazzitelli did not file objections to the motions, and did not request additional time to file objections.

DISCUSSION

In 1999, Debtors entered into the pizza sales and delivery business by purchasing three Domino's Pizza franchise stores from Williams, Inc. Debtors purchased the equipment and inventory and assumed various leases and obligations that Williams, Inc, had contracted prior to the sale. Domino's Pizza approved the transfer to Debtors and their continued operations of the stores as Domino's franchisees.

Williams, Inc. financed the purchase of the businesses by accepting promissory notes from the Debtors in the amount agreed for the purchase of the assets of each store. With the assistance from the Small Business Administration guaranty, Williams, Inc. had previously acquired financing from American State Bank at Osceola, Iowa, and granted the bank a security interest in the assets. Debtors agreed to make payments on the promissory notes by depositing funds in Willaims, Inc.'s account at American State Bank. The bank had rights of withdrawal on the account whereby it deducted the payments owed to it by Williams, Inc. Debtors granted Williams, Inc. a blanket security interest in all the assets of the businesses including those assets purchased directly from Williams, Inc. to secure payment of the notes.

Williams, Inc. subsequently sold its interest in the Debtors' promissory notes to Mazzitelli. Pursuant to the agreement, Williams, Inc. transferred all of its title, rights, and interests in the promissory notes and security agreements to Mazzitelli. Williams also personally guaranteed payment of the promissory notes.

After receiving notice of Debtors' filing for bankruptcy protection and before the first meeting of creditors, Williams, Inc. filed a motion asking the court to lift the automatic stay of 11 U.S.C. § 362. Williams, Inc. represented itself as a creditor with an ownership interest in the promissory notes, and stated that the lifting of the stay would be appropriate to allow it to proceed with foreclosure and/or replevin of the collateral. Debtors filed a timely resistance to the motion, and the court set the matter down for hearing.

At the telephonic hearing, Debtors' counsel indicated that Debtors would be filing motions to avoid the liens and redeem property. Counsel for the parties agreed that the three motions could be resolved at the same time and accordingly, the matters should be set for hearing. Counsel for Williams, Inc. did not inform the court that his client had previously transferred its interest in the promissory notes and security agreements, nor did counsel for the Debtors inform the court that neither he nor Debtors were aware of the transfer. The court issued a minute order continuing the hearing on the lift stay motion, continuing the effect of the automatic stay, and setting bardates for the filing of the motions and resistances.

Debtors timely filed the lien avoidance and redemption motions, and served notice of the bardate for objections as set forth in the court's minute order. Debtors served the documents and bardate notice on both Williams, Inc. and Mazzitelli, indicating that Debtors were aware of the transfer of the promissory notes and security interests. Williams, Inc. filed timely resistances to the motions. Mazzitelli did not file responses.

On January 7, 2003, the three pending motions came on for hearing. As part of its case, Williams, Inc. called James Mazzitelli to testify. It was at this point that the court

first was first made aware of the the transfer of the promissory notes and security agreements. At the conclusion of its proof, counsel for Williams, Inc. orally moved the court to amend its pleadings to conform with the evidence and allow Mazzitelli to be added as a party objecting to the motion to avoid lien. James Mazzitelli, apparently at the behest of Ray Williams and counsel, indicated a desire to join in the matter. Debtors did not consent and expressly refused to agree to the amendment. The court took this motion as well as the subject motions under advisement.

On January 13, 2001, Mazzitelli filed an objection to Debtors' exemptions contesting whether the identified items were in fact tools of the trade and also disputing the value ascribed to the items, and a hearing was held on the objection on March 7, 2003. In its post-hearing brief, Mazzitelli agrees that "the items of equipment, pizza making equipment, ovens, racks and the like" constitute tools of the trade pursuant to Iowa Code § 627.6(10). (Mazz. Br. at 3 & 6).

Currently pending before the court are Williams, Inc.'s Motion for Relief from Stay, Debtors' Motion to Avoid Liens and/or Motion to Redeem Property, Williams Motion to Amend by adding Mazzitelli as a party, Mazzitelli's Objection to Debtors' Exemption, and the respective resistances thereto. The court notes that Debtors' Motion to Avoid Liens and/or Motion to Redeem Property is in reality two separate motions with mutually exclusive relief. Accordingly, the court will treat the motions as though they were separately filed pleadings. See Local Rule 14(a)(effective at the time these matters were brought and stating that combined motions were not to be filed).

William, Inc.'s Standing

Debtors assert that Williams, Inc. lacks standing to bring the Motion for Relief from Stay and to object to the Motions to Avoid Lien and Redeem Property because it transferred its interest in the promissory notes and security agreements to Mazzitelli. The court agrees.

Standing to maintain an action is a threshold issue in every federal case. McCarney v. Ford Motor Co., 657 F.2d 230, 233 (8th Cir. 1981). To proceed in federal court, a plaintiff has the burden of proving: "(1) that he or she suffered an 'injury in fact,' (2) a causal relationship between the injury and the challenged conduct, and (3) that the injury likely will be redressed by a favorable decision." Steger v. Franco, Inc., 228 F.3d 889, 892 (8th Cir. 2000) citing Lujan v. Defenders of Wildlife, 504 U.S. 555, 560-61 (1992). The injury asserted may exist by virtue of a statute creating a legal right. Warth v. Seldin, 422 U.S. 490, 500 (1975). In such an instance, the statute provides a personal right of action, and generally, a plaintiff may not base a claim of relief on the rights of third parties. Id.

In this case, the evidence shows that Williams, Inc. entered into an agreement with Mazzitelli on April 26, 2001, to obtain financing in the amount of $100,000.00. In exchange for the funds, Williams, Inc. assigned all of its rights, title, and interests in the three Cole promissory notes to Mazzitelli. Williams, Inc. also assigned the all of its rights, title, and interest in the Cole security agreements and financing statements to Mazzitelli. Accordingly, Williams, Inc. is no longer a creditor of the Coles based on those promissory notes. Mazzitelli has the right to payment, and holds the security interest in the collateral granted by the security agreement. The fact that Ray Williams personally guaranteed the

notes and may be obliged to pay the notes in the event of default is insufficient to grant Williams Inc. standing in these matters.

It is Mazzitelli that will be injured by the continuation of the stay without being provided adequate protection; Mazzitelli that will be injured if the liens are avoided; and Mazzitelli who has a stake in the redemption of the property from the security interest. Williams, Inc. may not base a claim for relief on rights that it transferred to a third party. Accordingly, Williams, Inc.'s Motion For Relief from Stay will be denied. Further, Williams, Inc.'s objections to Debtors' Motions to Avoid Lien and Redeem Property will be overruled.

Motion to Amend to Add Mazzitelli as a Party

Williams, Inc. seeks to amend its objection to the lien avoidance and redemption motions to add Mazzitelli as an objecting party. Mazzitelli, apparently at the behest of Ray Williams, belatedly joined in the request. Unsurprisingly, Debtors do not consent to the amendment and actively resist the addition of Mazzitelli.

Williams, Inc. argues at length, that pursuant to Fed. R. Civ. P. 15, Mazzitelli should be made a party. It contends that the rule provides that leave to amend should be given freely in the interest of justice, and that debtors will not be prejudiced by the substitution of Mazzitelli for Williams, Inc.

Williams, Inc. overlooks the fact that Fed. R. Civ. P. 15 is inapplicable in this matter. Fed. R. Civ. P. 81(a)(1) provides that these rules apply to bankruptcy cases only to the extent provided by the Federal Rules of Bankruptcy Procedure. Fed. R. Bankr. P. 7015 incorporates Fed. R. Civ. P. 15 in the context of adversary proceedings. However, motions to avoid liens and redeem property are not conducted as adversary proceedings. See also

Fed. R. Bankr. P. 7001 (setting forth the scope of the rules of Part VII and identifying adversary proceedings). Rather, these motions are brought as contested matters under Fed. R. Bankr. P. 9014. Rule 9014 makes a number of rules from Part VII applicable to contested matters. Notably absent from this list is Rule 7015. Fed. R. Bankr. P. 9014(c). The court may make any other rule applicable in a contested matter after giving the parties notice and reasonable opportunity to comply with the procedure, Id., but the court has not done so in this matter.

Rule 9014 makes applicable Rule 7021, which incorporates Fed. R. Civ. P. 21. Rule 7021 provides for the addition of parties by the court upon motion of any party or upon the court's own volition. The rule gives the court broad discretion to add parties at anytime and under any terms or conditions that the court might impose. Fair Hous. Dev. Fund Corp. v. Burke, 55 F.R.D. 414, 419 (E.D.N.Y. 1972). The court may bring into the matter a person who was not made a party due to inadvertence, mistake, or some other reason, but whose participation was determined to be necessary or desirable. Id. The court is to be guided by the same standard of liberality used in relation to motions to amend under Fed. R. Civ. P. 15. Id. However, the terms of the addition of the party must be just. Sarne v. Fiesta Motel, 79 F.R.D. 567, 570 (E.D. Pa. 1978).

In this case, the court will add Mazzitelli as a party, but only to the extent necessary to resist the motion to avoid the lien. The court recognizes that Debtors gave Mazzitelli notice of the motions to avoid lien and redeem property along with notice of the seven-day bardate; Debtors pointedly stated that the seven days was a shortened period in which parties could object to the motions; and Mazzitelli did not file an objection to the motions or request additional time in which to respond. Further, James Mazzitelli initially testified that he did

not intend to file any pleadings in Debtors' case. It was only after a recess in the hearing that Mr. Mazzitelli expressed an interest in having Mazzitelli L.C. join in the objections. However, through its motion to avoid liens, Debtors seek to destroy a property interest that Mazzitelli has in the identified equipment and tools. For reasons that will be discussed at length later in this decision, the court does not find that the Code provides Debtors with the authority to avoid these particular liens. Therefore, the court finds it just and equitable to allow Mazzitelli to belatedly resist the motion to avoid liens.

However, the same concerns are not present in the context of the motion to redeem property. In this instance, Debtors seek only to pay Mazzitelli the value of property encumbered by the liens. As stated before, Debtors gave Mazzetilli notice of the motion, and the creditor declined to resist the motion or request additional time to respond. The court finds that Mazzitelli waived the right to object to the motion to redeem and, in essence, acquiesced to the redemption of the property. As Debtors will pay the value of the property, as determined by the court, Mazzitelli will not be damaged and will suffer no damage from the court declining to add it as a party at this time.

Motion to Avoid Lien

The Bankruptcy Code provides, that in certain specific instances, debtors may remove valid liens thereby depriving creditors of their interest in the encumbered property. Section 522 provides in pertinent part:

> (f)(1) Notwithstanding any waiver of exemptions but subject to paragraph (3), the debtor may avoid the fixing of a lien on an interest of the debtor in property to the extent that such lien impairs an exemption to which the debtor would have been entitled under subsection (b) of this section, if such lien is—
>
> * * *

(B) a nonpossessory, nonpurchase-money security interest in any--
(ii) implements, professional books, or tools, of the trade of the debtor or the trade of a dependent of the debtor; …

11 U.S.C. 522(f)(1).

Debtors have the burden of demonstrating that all the elements of lien avoidance under section 522(f) are satisfied. In re Shands, 57 B.R. 49, 50 (Bankr. S.C. 1985). They must show that: 1) they have exemptions which have been granted; 2) the lien being avoided is a judicial lien or nonpurchase money security interest; 3) such lien or interest impairs the above exemptions; and 4) as a matter of law they are entitled to have such liens or interests avoided under § 522(f). In re Clark, 11 B.R. 828, 831 (Bankr. W.D. Pa. 1981).

The Bankruptcy Code does not define a purchase money security interest. Therefore, the court looks to Iowa law for a description of the interest. Pristas v. Landaus of Plymouth, Inc., 742 F.2d 797, 800 (3rd Cir. 1984). The version of Article 9 of the Uniform Commercial Code that was in effect in Iowa at the time that the parties entered into the security agreement provides in relevant part:

> A security interest is a "purchase money security interest" to the extent that it is
>
> a. taken or retained by the seller of the collateral to secure all or part of its price; or
>
> b. taken by a person who by making advances or incurring an obligation gives value to enable the debtor to acquire rights in or the use of collateral if such value is in fact so used.

Iowa Code §554.9107 (1999). In essence, a purchase money security interest "is a secured loan for the price of new collateral." Farmers Coop. Elev. Co. v. Union State

Bank, 409 N.W. 2d 178, 180 (Iowa 1987) quoting, Henderson, Coordination of the Uniform Commercial Code With Other State and Federal Law in the Farm Financing Context, 14 Idaho L. Rev. 363,375 (1978).

Under Revised Article 9, a security interest does not lose its purchase money status even if "a. the purchase-money collateral also secures an obligation that is not a purchase-money obligation; b. collateral that is not purchase-money collateral also secures the purchase-money obligation; or c. the purchase-money obligation has been renewed, refinanced, consolidated, or restructured." Iowa Code § 554.9103(6) (2003). The revision adopts what was known as the "dual status" doctrine. In re McAllister, 267 B.R. 614, 621 (Bankr. N.D. Iowa 2001). In In re McAllister, the bankruptcy court of the Northern District of Iowa determined that Iowa followed the dual status doctrine even prior to Article 9's revision, and Iowa law provides that security interests may be partially purchase money and partially nonpurchase money. Id. at 621 & 624. The court agrees with the Northern District.

In this case, Williams, Inc. sold the pizza stores along with the equipment used therein and took back promissory notes for the payment. Each note specifically refers to an asset purchase agreement that identifies the property sold. The notes also state that payment is secured by security agreements dated as of the execution dates. It is apparent from the evidence that Debtors intended to grant and Williams, Inc. intended to accept a purchase money security interest in the store property, equipment, and inventory. Under the dual status doctrine, the inclusion of after acquired property and other collateral does not affect the purchase money security status of Williams, Inc.'s interest in the transferred store property.

Further, the fact that Williams, Inc. transferred the promissory notes and security interests to Mazzitelli does not alter their purchase money status. In Iowa, sellers of equipment routinely take a purchase money security interest in equipment and then transfer that interest to a financing company. Iowa law continues to recognize the interest's purchase money status. See generally, Deutz-Allis Credit Corp. v. Lynch Farms, Inc., 387 N.W.2d 593 (Iowa 1986) and Coachman Indus., Inc. v. Security Trust and Savings Bank of Shenandoah, 329 N.W.2d 648 (Iowa 1983).

Debtors argue that the assignment of the security interests to Mazzitelli, the consideration for which was $100,000.00 in new financing for Williams, Inc., somehow altered their purchase money status. In so arguing, Debtors appear to confuse the situation with that of debtors refinancing an existing debt secured by purchase money interest. In that instance, the question of whether the purchase money security interest survives refinancing turns on whether a novation has occurred. In re Nichols, 1988 WL 53381, at *2 (Bankr. N.D. Iowa); In re Bixby, No. 89-2859-CH Slip op. at 4-5 (Bankr. S.D. Iowa May 22, 1990) (Judge Hill Dec. #131). Here, no refinancing of the indebtedness has taken place; rather the secured party, Williams, Inc., has sold and assigned the promissory notes and the accompanying purchase money security interests to Mazzitelli.

Likewise, Debtors' argument that the security interests were filed too late to perfect a purchase money security interest is unavailing. Security agreements are enforceable against collateral when the security interest attaches. Iowa Code § 554.9302 (1999). Attachment occurs when the debtor has signed the security agreement describing the collateral; value has been given; and the debtor has rights in the collateral. Id. The

perfection provisions deal with the priority of the liens between two secured parties. Iowa Code §§ 554.9301 & 554.9302 (1999). Perfection typically becomes relevant when a secured party comes into conflict with a third party such as another secured lender or a bankruptcy trustee. White and Summers, Uniform Commercial Code, § 30-1(b) at 3 (5th ed., 2002).

Finally, the court notes that Debtors seek to identify certain property as being replacement items that are subject only to a general security interest as after acquired property. They state that certain items have been repaired, replaced, or broken. Debtors offered Ex. 5 and testified concerning these items.

To the extent that property was acquired after the purchase of the stores and not with purchase money advanced by Williams, Inc. for that purpose, the property would not be covered by the purchase money portion of the security interest. However, the court is not convinced that Debtors have sufficiently carried their burden in identifying the property they claim is not covered by the purchase money security interest and showing proof of its purchase. The court notes that the list of property claimed as exempt on which they seek to avoid the lien tracks with the property identified in the asset purchase agreement and the U.C.C. filings. Further, Debtors did not offer any receipts or other corroborating evidence concerning the purchase of the equipment. On the record before it, the court cannot sufficiently identify after acquired property in order to avoid the blanket security interest portion encumbering that property.

Accordingly, the court finds that Debtors have not met their burden to show that the liens they seek to avoid are nonpurchase money security interests. Therefore, their motion to avoid liens will be denied.

Motion to Redeem Property and Objection to Exemption

As stated above, the court will not add Mazzitelli to Williams, Inc.'s objection to the redemption motion. The court acknowledges that authority exists holding that property used in conducting business or with a profit motive is not "intended primarily for personal, family, or household use" and that the debts secured by such items do not constitute consumer debts as the concepts are envisioned by 11 U.S.C. § 722. Cypher Chiropractic Center v. Runski (In re Runski), 102 F.3d 744, 747 (4th Cir. 1996). However, Mazzitelli had adequate notice of the motion and failed to object or request additional time to respond. Therefore, the court finds that Mazzitelli accedes to the redemption of the property according to the terms set forth in the motion.

Mazzitelli timely objected to Debtors' claim of exemption. Iowa Code 627.6(10) provides that "if the debtor is engaged in any profession or occupation other than farming, the proper implements, professional books, or tools of the trade of the debtor or a dependent of the debtor, not to exceed in value ten thousand dollars in the aggregate" may be held exempt from execution. Mazzitelli argues that the value of the property exempted was significantly higher than the amount stated and exceeded the $10,000.00 per debtor allowed by state law. The thrust of the objection was Debtors should not be allowed to avoid the lien on all the property claimed exempt, should the court find that lien avoidance was available. Since the court ruled against Debtors on the lien avoidance issue, Mazzitelli's objection, as argued, is essentially mooted by the above rulings.

However, even if the objection is not moot, the court would still find that Debtors' valuation of the property for exemption and redemption purposes as estimated on their schedules represents a more accurate assessment of its value in the chapter 7 context.

Debtors based the value of their Domino Pizza packages on a statement from Huron Valley Restaurant Equipment of Dexter, Michigan. Debtors faxed the lists of equipment to that firm, and Huron Valley responded that the ovens listed were no longer produced, so they would offer no more than $6,000.00 for the equipment of store # 1750 and $6,500.00 for the equipment of store # 1755.

Debtors also presented the testimony of John Pierce, the sales manager for Star Food Service Equipment and Repair (hereinafter Star Equipment) of Cedar Rapids, Iowa. Star Equipment engages in the purchase and sale of used food service equipment. Mr. Pierce testified that the liquidation value of the equipment was less than Debtors offered in their redemption motion with the smaller items such as the stainless steel tables having more value than the ovens because of their portability and utility in other food service establishments. He placed no value on the ovens because the cost of removal and installation at another establishment along with their age made resale somewhat speculative.

Mazzitelli countered with testimony from Ray Williams who placed a value on most of the items at 50% of the new cost. Mr. Williams acknowledged that certain items would have minimal value outside of a Domino's store. However, those items would be required by the franchiser, so he placed a value on them.. He disputed Mr. Pierce's appraisal of the ovens, stating that based on his personal experience the ovens were worth in the range of $7,500.00 each.

After viewing the demeanor of the witnesses and listening to their testimony in open court, the court finds that Mr. Pierce provided the more credible testimony of the value of the equipment. He is unbiased in his appraisal having nothing to gain from

undervaluing the equipment. In fact, he seemed willing to agree that valuing used equipment involved a certain amount of guess work, and the true value of the equipment ultimately was set by the person who bought it.

In contrast, Ray Williams is not completely disinterested in the matter. His company sold the businesses and equipment to Debtors. After assigning the promissory notes and security agreements to Mazzitelli, he personally guaranteed the promissory notes. It is better for him if Mazzitelli forecloses on the collateral and he takes over the businesses pursuant to their agreement, rather than if the property is redeemed and Debtors continue operating the businesses. Further, animosity has arisen between Ray Williams and Debtors. The court discounts Ray Williams' testimony as to the value of the equipment and finds that $7,500.00 for the equipment concerning store # 1750 and $6,500.00 for the equipment concerning store #1755 represents the reasonable value of the property under Iowa Code § 627.6(10). Accordingly, the court will overrule Mazzitelli's objection to Debtors' claim of exemption.

ORDER

IT IS ACCORDINGLY ORDERED as follows:

1. Williams, Inc.'s Motion for Relief From Stay is DENIED.

2. Williams Inc.'s oral Motion to Amend its pleading to add Mazitelli, L.C. as an objecting party is GRANTED in part and DENIED in part. Pursuant to Fed. R. Bankr. P. 7021 Mazzitelli is added for the limited purpose of resisting the Motion to Avoid Liens. For the reasons set forth in the decision, Mazzitelli is not added or permitted to object to the Motion to Redeem Property.

3. Michael F. and Stacey K. Cole's Motion to Avoid Liens is DENIED.

4. Michael F. and Stacey K. Cole's Motion to Redeem Property is GRANTED. Debtors shall consummate the redemption by presenting payment to Mazzitelli, Inc. within 45 days of the entry of this order.

5. Mazzitelli Financing L.C.'s Objection to Claim of Exemptions is OVERRULED.

6. The court's extension of the automatic stay as provided in its order of December 20, 2002, is hereby dissolved.

Dated this _____ day of December, 2003.

_____
RUSSELL J. HILL, JUDGE
U.S. BANKRUPTCY COURT