UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

No: 90-6121

FILED
AUG 20 1991
LEONARD GREEN, Clerk

In re: BLUEGRASS FORD-MERCURY, INC.

Debtor

BLUEGRASS FORD-MERCURY, INC.,

Plaintiff - Appellee,

v.

FARMERS NATIONAL BANK OF CYNTHIANA,

Defendant - Appellant.

Before: **Guy** and **Ryan,** Circuit Judges;
Joiner, Senior District Judge.

JUDGMENT

ON APPEAL from the United States District Court for the Eastern District of Kentucky at Lexington.

THIS CAUSE was heard on the record from the district court and was submitted on briefs without oral argument.

ON CONSIDERATION WHEREOF, it is ordered that the judgment of the district court is affirmed.

ENTERED BY ORDER OF THE COURT

Leonard Green, Clerk

Issued as Mandate:

COSTS:

Filing Fee .....$
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Attest:

Deputy Clerk

UNITED STATES COURT OF APPEALS
SIXTH CIRCUIT
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CINCINNATI, OHIO 45202-3988

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November 13, 1991

Taft A McKinstry
Barry M. Miller
Joseph M. Scott, Jr.

Re: Case No. 90-6121
Bluegrass Ford-Mercury, Inc., Plaintiff-Appellee v.
Farmers National Bank of Cynthiana, Defendant-
Appellant
District Court No. 90-00031

Dear Counsel:

Enclosed is a corrected copy of the page from the decision originally sent to you August 20, 1991. Please make corrections in your published version as indicated on page 12, line 1 of footnote 4; page 20, line 3; page 22, line 12 and page 23, lines 4 and 22.

Thank you for your cooperation in this matter.

Yours very truly,

Leonard Green, Clerk

By Linda K. Martin/gst
(Mrs.) Linda K. Martin
Deputy Clerk

Enclosure

cc: Honorable G. Wix Unthank
Leslie G. Whitmer, Clerk
Legal Resource Center
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Bureau of National Affairs
Ms. Vickie Long

secured party knows of or consents to the transfer.

Again, we note that the corresponding UCC provision, § 9-402(7), is nearly identical.[3]

The last sentence in section 9-402(7) is particularly applicable to the facts before us. "A filed financing statement remains effective with respect to collateral transferred by the debtor even though the secured party knows of or consents to the transfer." *Id.* Thus, this sentence, when read together with section 9-306(2), supports the following interpretation.

> If the secured party does not authorize the disposition or if the secured party authorizes the disposition subject to the security interest, the security interest will continue in the collateral following the disposition (§9-306(2)) and no new financing statement or amendment to the existing financing statement will be required in order to continue the perfected status of the security interest in the collateral following the disposition (§ 9-402(7)).

Commentary at 12. Thus, any collateral transferred from Bluegrass to Bluegrass Ford-Mercury would be subject to Farmers' security interest, which was perfected by the 1977 financing statement.[4] The issue is whether Farmers' security interest included those vehicles acquired by Bluegrass Ford-Mercury after Bluegrass Ford's transfer of inventory.

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[3]The difference between the two provisions is as follows. In the second sentence of the Kentucky statute, "more than four (4) months after the debtor notifies the secured party in writing of the change" is substituted for the UCC language, "more than four months after the change."

[4]Farmers' perfected security interest in the vehicles transferred from Bluegrass Ford's inventory to Bluegrass Ford-Mercury's inventory remained effective. There is no evidence in the record, however, that any of those vehicles were in Bluegrass Ford-Mercury's inventory during the preference period.

dispute this finding, but argues that it was a secured creditor. Thus, because we find that Farmers was not a perfected secured creditor, and as such it would not have received any payment under Chapter 7, any payments Farmers received were in excess of the amount to which it was entitled.

IV.

Farmers also argues that at least one of the exceptions to section 547(b) applies. Thus, Bluegrass is not entitled to avoid the payments it made to Farmers as preferential.

Title 11 U.S.C. § 547(c) enumerates several exceptions to section 547(b). In particular, Farmers asserts that sections 547(c)(3) and 547(c)(4) apply. Title 11 U.S.C. § 547(c)(3) provides:

> (c) The trustee may not avoid under this section a transfer--
>
> . . . .
>
> (3) of a security interest in property acquired by the debtor--
>
> (A) to the extent such security interest secures new value that was--
>
> (i) given at or after the signing of a security agreement that contains a description of such property as collateral;
>
> (ii) given by or on behalf of the secured party under such agreement;
>
> (iii) given to enable the debtor to acquire such property; and

section in Farmers' brief, that Farmers believes that the remaining balance on these loans for "new value"[6] should be credited against the preferential payments made to Farmers on Bluegrass' other indebtedness. Farmers cites no law for this proposition. We find that Farmers was properly found immune from a preference attack pursuant to section 547(c)(3) by the bankruptcy court for payments Bluegrass made to acquire new inventory after October 8, 1981. To apply the remaining balance on these post-October 8, 1981, loans to offset the preference payments made on other non-secured or perfected loans would, in fact, be elevating Farmers' status to that of a perfected secured creditor on the other loans. This would be contrary to section 547(b)(5)(A) -- the section that limits protected payments made during the preference period to the amount the creditor would have received under a Chapter 7 liquidation.

Farmers also asserts that the exception provided for in 11 U.S.C. § 547(c)(4) applies. Section 547(c)(4) provides the following:

> (c) The trustee may not avoid under this section a transfer--
>
> . . . .
>
> (4) to or for the benefit of a creditor, to the extent that, after such transfer, such creditor gave new value to or for the benefit of the debtor--
>
> (A) not secured by an otherwise unavoidable security interest; and

---

[6]Title 11 U.S.C. § 547(a)(2) defines new value as follows:

> (2) "new value" means money or money's worth in goods, services, or new credit, or release by a transferee of property previously transferred to such transferee in a transaction that is neither void nor voidable by the debtor or the trustee under any applicable law, but does not include an obligation substituted for an existing obligation. . . .

> (B) on account of which new value the debtor did not make an otherwise unavoidable transfer to or for the benefit of such creditor[] . . . .

This section is commonly characterized as a subsequent advance rule. *In re Fulghum Constr. Corp.*, 706 F.2d 171, 172 (6th Cir.), *cert. denied*, 464 U.S. 935 (1983).

Farmers argues that the balance due on the notes entered into after October 8, 1981, and before January 5, 1982, should be applied against "the approximately $91,000.00 allegedly preferential payment[s] made by Bluegrass within the 90 days." In essence, Farmers is making the same argument it made for the application of section 547(c)(3). Again, we reject this argument, and for the same reason we rejected it earlier. Farmers was an unsecured, unperfected creditor with regard to the notes on which the approximately $91,000 in payments were made. We cannot apply the balance on Farmers' secured loan toward the payments -- which we have concluded were preferential -- Bluegrass made to Farmers on its unsecured loans. To do so would improperly subordinate other secured creditors to Farmers in its role as an unsecured creditor.

AFFIRMED.