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Article 9: Secured Transactions

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mercial Code § 10-101. During the period in which the transactions took place, Section 5 of the Banking Collection Code was the applicable law. Thus, if the court were citing the Code as the controlling law, it was in error. However, the court may well have been adopting the provisions of Section 4-202 to supplement the rule of Section 5 of the Banking Collection Code; the former says, in essence, the same as the latter, except in more detail.

S.H.G.

ARTICLE 9: SECURED TRANSACTIONS

SECTION 9-102. Policy and Scope of Article

IN THE MATTER OF UNITED THRIFT STORES, INC.
242 F. Supp. 714 (D.N.J. 1965)

Redisco, Inc., financing agent for a manufacturer of home appliances, filed a financing statement with the Secretary of State of New Jersey covering appliances that were to be delivered to United Thrift Stores, Inc. (Thrift), a distributor. Thereafter, Redisco, Thrift and the manufacturer entered into four separate but identical agreements, each containing the following sections: (1) A bill of sale from the manufacturer to Redisco; (2) a promissory note from Thrift to Redisco; and (3) a trust receipt from Thrift to Redisco. The release amount of the trust receipts was fixed at the full amount of the promissory notes, and the terms of payment were set at ninety days or one-third at thirty, sixty and ninety days. Shortly after the execution of the four agreements, Thrift filed a Chapter XI petition in bankruptcy. Redisco, in turn, filed a petition for reclamation of the appliances, which the referee denied.

The district court reversed and held that Redisco had a valid security interest in the appliances and was thus entitled to reclamation. In reaching this result the court first decided that the trust receipts had created a valid security interest under Sections 1-201(37), 9-102(1)(a) and -102(2), and had met the requirements for a valid security agreement under Sections 9-105(1)(h), -201 and -203(1)(b). It then found that the financing statement was correctly filed under Section 9-401 and that the security interest had attached under Section 9-204(1) "when the agreements were made, value was given, and United Thrift received possession of the collateral."

The trustee contended that the security interest had not been perfected because the agreements had not been executed prior to the filing of the financing statement. The court, however, held otherwise, citing Sections 9-303(1) and -402(1) which provide that the steps for perfection may be taken prior to attachment and in such a case, perfection occurs on attachment. The court then concluded that because of Thrift's default, Redisco was entitled to repossession of the collateral or the proceeds thereof under Sections 9-306 and -503 and, because the perfection had preceded the bankruptcy, Redisco had priority over the trustee.

In a separate argument, the court also rejected the referee's argument that the terms of payment indicated that the sale had been on open account,

holding instead that the terms were not necessarily indicative of an open account and, moreover, under Sections 9-203(1)(b) and -205, they did not negative an intent to enter into a secured transaction.

S.H.G.

SECTION 9-105. Definitions and the Index of Definitions

IN THE MATTER OF UNITED THRIFT STORES, INC.
242 F. Supp. 714 (D.N.J. 1965)
Annotated under Section 9-102, supra.

SECTION 9-201. General Validity of Security Agreement

IN THE MATTER OF UNITED THRIFT STORES, INC.
242 F. Supp. 714 (D.N.J. 1965)
Annotated under Section 9-102, supra.

UNITED STATES V. LEBANON WOOLEN MILLS CORP.
241 F. Supp. 393 (D.N.H. 1965)
See Comment, infra p. 366.

SECTION 9-203. Enforceability of Security Interest; Proceeds, Formal Requisites

IN THE MATTER OF UNITED THRIFT STORES, INC.
242 F. Supp. 714 (D.N.J. 1965)
Annotated under Section 9-102, supra.

SECTION 9-204. When Security Interest Attaches; After-Acquired Property; Future Advances

BLANCOB CONSTR. CORP. V. 246 BEAUMONT EQUITY, INC.
261 N.Y.S.2d 227 (App. Div. 1965)

The defendant was the assignee of a conditional sales contract under which a heating boiler, an oil burner and a storage tank were installed in an apartment building which had been mortgaged to the plaintiff. The mortgage contained a standard after-acquired property clause. Without obtaining the plaintiff's consent, the defendant's assignor removed the old heating equipment when it installed the new unit.

Plaintiff brought this action to foreclose its mortgage, and asserted priority to the new heating unit by virtue of the after-acquired property clause. The parties stipulated that the heating unit was personal property. The lower court refused to grant plaintiff's motion for a summary judgment and the appellate court affirmed, holding that plaintiff had failed to present facts and details indicating that "defendant's title should be subordinated to the lien of plaintiff's mortgage."

While discussing the substantive issues, the court stated, as the general rule, that a conditional sales agreement establishes a lien on fixtures superior to that of an after-acquired property clause of a mortgage. The court, citing Sections 9-108, -204 and -303, noted that although the Code was not in effect at the time of this case, the rule would seem to be the same under the Code.

Plaintiff contended that, notwithstanding the general rule, defendant's lien should be subordinated to its lien since defendant had removed the old equipment without the plaintiff's consent. The court rejected this argument on the ground that the plaintiff's proper remedy was a suit against the defendant to recover the value of the old equipment and the damages to the building caused by the removal of the new equipment.

COMMENT

The court cited Sections 9-108, -204, and -303 in support of the proposition that "the title of a conditional vendor to removable fixtures installed upon realty was superior to the lien of a prior mortgage containing the standard 'after-acquired' property clause." This was stated as a general proposition of law. However, finer distinctions would have to be made were this case decided under the Code.

Basically, in determining priority it would be important to distinguish between personal property and fixtures. If the heating equipment were, as the parties stipulated, personal property, then under Section 9-312(4) the defendant's purchase money security interest would prevail only if he *perfected* his security interest under Section 9-303 prior to the debtor's possession of the collateral or within ten days thereafter. Conversely, if the heating equipment were designated a fixture, then under Section 9-313(2) the defendant would prevail over the mortgagee if its security interest *attached* to the equipment pursuant to Section 9-204 before the equipment was affixed to the realty.

S.H.G.

IN THE MATTER OF UNITED THRIFT STORES, INC.
242 F. Supp. 714 (D.N.J. 1965)
Annotated under Section 9-102, supra.

SECTION 9-205. Use or Disposition of Collateral Without Accounting Permissible

IN THE MATTER OF UNITED THRIFT STORES, INC.
242 F. Supp. 714 (D.N.J. 1965)
Annotated under Section 9-102, supra.

SECTION 9-303. When Security Interest Is Perfected; Continuity of Perfection

IN THE MATTER OF UNITED THRIFT STORES, INC.
242 F. Supp. 714 (D.N.J. 1965)
Annotated under Section 9-102, supra.

SECTION 9-306. "Proceeds"; Security Party's Rights on Disposition of Collateral

IN THE MATTER OF UNITED THRIFT STORES, INC.
242 F. Supp. 714 (D.N.J. 1965)
Annotated under Section 9-102, supra.

SECTION 9-313. Priority of Security Interests in Fixtures

BLANCOB CONSTR. CORP. v. 246 BEAUMONT EQUITY, INC.

261 N.Y.S.2d 227 (App. Div. 1965)

Annotated under Section 9-204, supra.

SECTION 9-318. Defenses Against Assignee; Modification of Contract After Notification of Assignment; Term Prohibiting Assignment Ineffective; Identification and Proof of Assignment

HUDSON SUPPLY & EQUIP. CO. v. HOME FACTORS CORP.

210 A.2d 837 (D.C. Ct. App. 1965)

Defendant Hudson and the Eastern Brick & Tile Co. were reciprocally indebted to one another as a result of sales transactions. The plaintiff, Eastern's assignee of its accounts receivable due from the defendant, brought suit "for the amount due under the accounts." In finding for the plaintiff, the lower court rejected defendant's argument that its claims against Eastern should be set off against plaintiff's claim. Rather, it concluded that the debt running from Eastern to defendant was a matter for them to settle in a separate action.

The court of appeals reversed, holding that since the defendant's claims against Eastern had accrued prior to the assignment, they should have been set off against the plaintiff's claim. Although the Code was not in effect at the time of this transaction, the court, in a footnote, cited Section 9-318 "which makes the rights of an assignee generally subject to any defense or claim of the account debtor against the assignor which accrues before the account debtor receives notification of the assignment."

G.F.P.

SECTION 9-401. Place of Filing; Erroneous Filing; Removal of Collateral

IN THE MATTER OF UNITED THRIFT STORES, INC.

242 F. Supp. 714 (D.N.J. 1965)

Annotated under Section 9-102, supra.

SECTION 9-402. Formal Requisites of Financing Statement; Amendments

BENEDICT v. LEBOWITZ

346 F.2d 120 (2d Cir. 1965)

Plaintiff delivered to Hargrove Typesetting Service certain equipment under a chattel mortgage. To perfect his security interest in the equipment, the plaintiff filed the chattel mortgage, a financing statement and a filing fee with the Secretary of State. He did not formally sign the financing statement in the space at the bottom reserved for the secured party's signature. He did, however, have his secretary type his name into the body of the statement. Hargrove was subsequently adjudicated a bankrupt. Plaintiff's reclamation

petition was opposed on the ground that the financing statement had not been signed, but the referee granted the petition and the district court agreed.

The circuit court affirmed, holding that under Section 9-402(1), a formal signature was not required. Rather, under Section 1-201(39), a signature "includes any symbol executed or adopted . . . with present intention to authenticate a writing." The court concluded that since the plaintiff had his secretary type his name into the body of the statement and had subsequently filed it, he had manifested the requisite intent. Support was found for this in Section 1-102 which provides that the act should be liberally construed and applied to facilitate the simplification, clarification and modernization of the law governing commercial transactions.

The court also noted that under Section 9-402(5), a financing statement in substantial compliance with the rest of the section would not be invalidated by a minor error and implied that the lack of a formal signature in this fact situation was a minor error.

S.H.G.

WILSHIRE OIL CO. v. COSTELLO

348 F.2d 241 (9th Cir. 1965)

Elliott Oil Co. assigned certain accounts receivable to Wilshire as security on a debt. The notice of assignment was filed by Elliott at Wilshire's written request but, while it contained the names of both parties, only Elliott had signed it. Subsequently, Elliott filed a voluntary petition in bankruptcy. The district court held that the trustee owned the accounts free and clear of Wilshire's claim because Sections 3018 and 3019 of the California Civil Code required that the notice of assignment be signed by both the assignor and the assignee. Wilshire appealed, contending that the statute was "directory" rather than "mandatory" and that in any case there had been substantial compliance with the filing provisions.

The court of appeals declared that the statute was mandatory and held that the assignment was ineffective as against the trustee for want of proper filing. While the Civil Code contained no explicit provision for "substantial compliance," the court seemed to imply one, using Section 9-402(5) of the Commercial Code as a model. It noted, however, that not even that minimal standard had been met.

COMMENT

The sections of the Civil Code which controlled this case have since been repealed and supplanted by the Uniform Commercial Code. It is unlikely that the court could have reached this result had the Code controlled the instant case. Concededly, Section 9-402(1) calls for the signatures of both parties, but it is important to note that the purpose of this section, as expressed by Comment 2, is to "adopt the system of 'notice filing' . . . ." Inasmuch as the filing in this case contained all the pertinent information and lacked only a signature, it is clear that it gave adequate *notice* of the assignment.

Beyond this, it could well be found that this filing satisfied the requirement of two signatures. Section 1-201(39) defines a signature as "any symbol

executed or adopted by a party with present intention to authenticate a writing." It was held in *Benedict v. Lebowitz*, 346 F.2d 120 (2d Cir. 1965), annotated under this section, that where the intent to authenticate was otherwise shown, the typewritten insertion of a party's name was a signature under Sections 1-201(39) and -102. The court added in that case that the result could have been supported by the substantial compliance provision of Section 9-402(5).

In dealing with the question of substantial compliance in the instant case, however, the court adopted the defendant's argument that an assignee's signature is required not for the purpose of giving notice but as authentication that an assignment has actually taken place. Defendant argued that this two-signature requirement would prevent illusory and fraudulent assignments by a debtor seeking to protect his accounts from creditors. While this may have been a strong argument under the Civil Code, Comment 2 to Section 9-402 makes it clear that such authentication is not the intent of the Commercial Code and that once notice is given, "further inquiry from the parties concerned will be necessary to disclose the complete state of affairs."

G.F.P.

IN THE MATTER OF UNITED THRIFT STORES, INC.

242 F. Supp. 714 (D.N.J. 1965)

Annotated under Section 9-102, supra.

SECTION 9-503. Secured Party's Right to Take Possession After Default

IN THE MATTER OF UNITED THRIFT STORES, INC.

242 F. Supp. 714 (D.N.J. 1965)

Annotated under Section 9-102, supra.

SECTION 9-504. Secured Party's Right to Dispose of Collateral After Default; Effect of Disposition

ASSOCIATES DISCOUNT CORP. V. CARY

262 N.Y.S.2d 646 (Civ. Ct. 1965)

The defendant Cary was a seaman who was repeatedly required to move to various east coast cities. While in the District of Columbia, he bought an automobile from the plaintiff's assignor under a conditional sales contract. After having paid one-third of the installments, the defendant defaulted while domiciled in Massachusetts, and, as a result, the plaintiff repossessed and resold the automobile in that state. Pursuant to the terms of the contract and in keeping with the governing law of the District of Columbia, the plaintiff conducted the sale without first giving notice to the defendant. Since the proceeds of the sale were insufficient to discharge the debt, this action for a deficiency judgment was brought in New York, where the defendant was then residing.

The court dismissed the complaint and entered judgment for the defendant. The New York rule concerning deficiency judgments is that "if the repossession and resale are not in compliance with the law no suit for any claimed deficiency will lie." In the instant case, there were two jurisdictions

outside the forum with conflicting rules on the question of repossession and resale, and it thus became necessary for the court to determine which body of law would govern this transaction. In resolving this question, the court decided that the District of Columbia law would apply to any controversy regarding the validity or interpretation of the contract, but when a remedy is sought in another state, namely Massachusetts, the remedy is controlled by the law of that state. In Massachusetts, the governing law on this subject is the Code. However, the question arose whether Massachusetts would apply its own law or that of the District of Columbia. The court then turned to Section 1-105 of the Code and concluded that Massachusetts would apply its own law.

Under Section 9-504(3) of the Massachusetts Code, the secured party must give notice to the debtor before the resale takes place. Since notice was not given, "the repossession and resale . . . [were] not in compliance with the [Massachusetts] law," and thus plaintiff was not entitled to a deficiency judgment.

COMMENT

In declaring its basic proposition that no action for a deficiency judgment would lie where the resale was not "in compliance with the law," the court cited a line of cases which are grounded in Sections 79 and 80 of the New York Personal Property Law. Under these cases, a creditor who has received less than 50% of the purchase price can elect to keep the collateral unless the debtor demands a resale. *Compare*, U.C.C. § 9-505. If he voluntarily sells the collateral without first giving notice to the debtor, the effect will be the same as if the creditor has not sold the article—the debt will be discharged and no action for a deficiency will lie. *Mott v. Moldenhauer*, 261 App. Div. 724, 27 N.Y.S.2d 563 (1941); *Island Installment Corp. v. Panico*, 37 Misc.2d 186, 233 N.Y.S.2d 812 (1962). It must be noted, however, that under this line of cases the debtor is not entitled to recover damages from the creditor for any loss incurred because of the creditor's failure to give notice. See *Ryan v. General Motors Acceptance Corp.*, 248 App. Div. 668, 288 N.Y.S. 912 (1936).

After the present case was decided, New York adopted the Code and thus repealed Sections 79 and 80 of the Personal Property Law. The question thus arises whether the same result would be reached on these facts today.

Since the Code does not expressly make a deficiency judgment available to a creditor who conducts a resale without giving notice to the debtor, it is entirely possible that the New York courts will continue to follow this line of cases and deny the creditor a deficiency judgment. Section 9-504(2) merely provides that the debtor is liable for the deficiency, and subsection (3) imposes upon the creditor a duty of giving notice. Upon the face of it, then, the Code contains nothing which would require the courts to abandon this line of decisions. Moreover, Section 9-505 contains substantially the same requirements as Sections 79 and 80 of the Personal Property Law with regard to consumer goods. It would be entirely proper to use this section to support this line of cases.

Upon examination of Section 9-507(1), however, one finds that "if the disposition has occurred the debtor . . . has a right to recover from the secured party any loss caused by a failure to comply with the provisions of this part." Furthermore, this subsection provides a penalty in the case of consumer goods as "the debtor has a right to recover in any event an amount not less than the credit service charge plus ten per cent of the principal amount of the debt or the time price differential plus ten per cent of the cash price." Given the fact that the debtor has this right of recovery under the Code, it would appear that he is now protected from the effects of such a sale without notice, and there is thus no longer any reason to deny the deficiency judgment. On balance, therefore, it would seem that the more reasonable course of action would be to protect both parties by giving the creditor his deficiency judgment as limited by the damages to which the debtor is entitled as a result of the improper sale.

G.F.P.

SECTION 9-507. Secured Party's Liability for Failure to Comply With This Part

ASSOCIATED DISCOUNT CORP. v. CARY
262 N.Y.S.2d 646 (Civ. Ct. 1965)
Annotated under Section 9-504, supra.