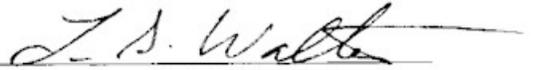


This document has been electronically entered in the records of the United States Bankruptcy Court for the Southern District of Ohio.

IT IS SO ORDERED.

Dated: June 09, 2008


Lawrence S. Walter
United States Bankruptcy Judge

UNITED STATES BANKRUPTCY COURT
FOR THE SOUTHERN DISTRICT OF OHIO
WESTERN DIVISION AT DAYTON

In re: BUCKEYE STATE LOGISTICS, INC.,

Debtor.

Case No. 06-30322

Adv. No. 07-3131

STAR LEASING CO.,

Plaintiff

Judge L. S. Walter
Chapter 7

v.

DAVID L. MIKEL, BANKRUPTCY TRUSTEE,
ET AL.,

Defendants.

DECISION GRANTING PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT

The court has jurisdiction over this matter pursuant to 28 U.S.C. §§ 157(a) and 1334, and the standing General Order of Reference in this District. This is a core proceeding by virtue of 28 U.S.C. § 157(b)(2)(K) and (O).

This matter is before the court on the Motion for Summary Judgment (“Motion”) (doc. 23) and Reply (doc. 27) filed by Plaintiff Star Leasing Co. (“Star”) and the Response filed by Defendant David L. Mikel, Trustee (“Trustee”) (doc. 24). The parties have also filed “Stipulations of Fact” with the court, including several documents mutually deemed authenticated and admissible (doc. 22). For the most part, the parties do not raise significant factual or legal issues, but primarily dispute the interpretation of a document entitled “Accounts Receivable Purchase and Security Agreement” (“Factoring Agreement”) (Joint Exhibit IV) which is an agreement between the Debtor, Buckeye State Logistics, Inc. (“Debtor”) and Transportation Alliance Bank, Inc. (“TAB”).

FACTUAL BACKGROUND

Star is a judgment creditor of Debtor. In an attempt to collect its debt, Star obtained a non-wage garnishment order in state court on September 20, 2005 which was served on Debtor’s customer, Amstan Logistics, Inc. (“Amstan”), on September 27, 2005. Although Debtor had performed services for which Amstan owed \$15,698.77 as of that date, Amstan filed its Answer of Garnishee indicating that it owed nothing to Debtor. Amstan thought that any funds it owed to Debtor were subject to the Factoring Agreement between Debtor and TAB. On November 28, 2005, TAB acknowledged its release of its interest in Debtor’s accounts receivable. Debtor filed its bankruptcy on February 24, 2006. On April 30, 2007, Amstan turned over to the Trustee the sum of \$16,576.73 which is the subject of this dispute.

Debtor and TAB entered into the Factoring Agreement on August 5, 2004. Generally, the Factoring Agreement establishes the terms and procedures by which TAB could purchase certain of the receivables of Debtor, denominated “Purchased Accounts.” Accounts that TAB chose not to purchase were nevertheless collected by TAB and were defined as “Serviced Accounts.” Consequently, all of Debtor’s invoices to its customers were required to bear a “Notation”

indicating that the account had been assigned and that payments was to be made directly to TAB. The Factoring Agreement also included a security agreement by which TAB was granted a security interest in essentially all of Debtor's personal property to secure all of Debtors "Obligations" under the Factoring Agreement. TAB filed a UCC financing statement with the Ohio Secretary of State on August 4, 2004 and thereby held a perfected first priority security interest in, among other things, all of Debtor's existing and future accounts receivable.

TAB only purchased Debtor receivables due from Amstan that were documented by Debtor invoices and its only claim against the \$16,576.73 amount held by the Trustee pertains to a single invoice dated May 19, 2005 in the amount of \$1,928.88. The net amount currently claimed by Star is \$12,971.70 plus applicable interest.

SUMMARY JUDGMENT STANDARD

The standard for addressing Star's Motion for Summary Judgment is contained in Fed. R. Civ. P. 56(c) and incorporated in bankruptcy adversary proceedings by reference in Fed. R. Bankr. P. 7056. The rule states in part that a court must grant summary judgment to the moving party if:

the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.

Fed. R. Civ. P. 56(c). In order to prevail, the moving party, if bearing the burden of persuasion at trial, must establish all elements of its claim. *Celotex Corp. v. Catrett*, 477 U.S. 317, 331 (1986).

If the burden is on the nonmoving party at trial, the movant must: 1) submit affirmative evidence that negates an essential element of the nonmoving party's claim; or 2) demonstrate to the court that the nonmoving party's evidence is insufficient to establish an essential element of the nonmoving party's claim. *Id.* at 331-32.

Thereafter, the opposing party “must come forward with ‘specific facts showing that there is a genuine issue for trial.’” *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 586-87 (1986) (citations omitted); *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 249-251 (1986). All inferences drawn from the underlying facts must be viewed in a light most favorable to the party opposing the motion. *Matsushita*, 475 U.S. at 586-88.

Summary judgment is proper when the nonmoving party has had adequate time for discovery and yet “fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial.” *Celotex*, 477 U.S. at 322.

LEGAL ANALYSIS

Star’s argument relies on the language of the Factoring Agreement that provides for both the purchase of specifically selected Debtor receivables by TAB as well as a security interest in non-purchased receivables which are merely serviced by TAB. Under this construction, Star’s lien would have effectively attached to any owed funds in the hands of Amstan that were not attributable to purchased invoices. Only one invoice in the amount of \$1,928.88 was identified as having been purchased, so the balance of the funds would be subject to the competing liens of TAB and Star, with TAB having priority until it released its interest in November of 2005. The result under this interpretation, is that Star would have a non-avoidable lien in the proceeds to the extent of its net claim.

The Trustee’s argument rests entirely on the view that the Factoring Agreement created an absolute assignment to TAB of all present and future accounts receivable of Debtor rather than a dual arrangement for the purchase of selected receivables coupled with a security interest covering those not purchased. In support of his interpretation of the agreement, he points to the contractual requirement that all Debtor invoices bear the notation that “This account has been

assigned and is payable directly to Transportation Alliance Bank, Inc.” He also points to the language of the agreement giving TAB the “exclusive right to collect any and all Accounts whether purchased by Purchaser or otherwise and receive payments thereon.” Under the Trustee’s construction, at the time Amstan received the garnishment order it was “bound” by the notation on the invoice to pay TAB rather than Debtor and Amstan correctly responded that it did not hold any funds belonging to Debtor because Debtor no longer had rights in the receivables.

An “absolute assignment,” sometimes referred to as a “true sale,” is simply a sale of an asset such as an account receivable without the seller retaining any interest in it. *See* Utah Code Ann. § 70A-9a-318(1) (2001).¹ As in this case, it is frequently difficult to determine whether a given commercial transaction constitutes such an absolute assignment or just an assignment for security in which the assignor/debtor retains an interest in the receivable. If TAB took an absolute assignment of all Debtor’s receivables, then Star’s garnishment lien could not have attached to the receivables in Amstan’s possession because those receivables belonged entirely to TAB. On the other hand, if TAB only had a security interest in the receivables (except for those specifically purchased), then most of the funds in the possession of Amstan were actually owed to Debtor notwithstanding the collection or servicing arrangement with TAB.

Article 9 of the Uniform Commercial Code (“UCC”), as adopted in Utah, pertains to both sales of and security interests in accounts receivable, but does not provide a precise formula or blueprint for delineating between the two. *See* Utah Code Ann. § 70A-9a-109 (2001). Comment 4 of the official commentary to U.C.C. § 9-109 makes this quite clear:

Although this Article occasionally distinguishes between outright sales of receivables and sales that secure an obligation, neither this Article nor the definition of "security interest" (Section 1-201(37)) delineates how a particular transaction is to be classified. That issue is left to the courts.

¹ Although the parties have not raised a choice of law issue, the Factoring Agreement does designate the laws of Utah. The Utah version of the Uniform Commercial Code does not differ appreciably from the version in effect in Ohio and most other states, but the court will cite to the Utah code where applicable.

Likewise, the particular labeling language used in the UCC is not intended to address the ultimate distinction between a true sale and a financing transaction:

Use of terminology such as "security interest," "debtor," and "collateral" is merely a drafting convention adopted to reach this end, and its use has no relevance to distinguishing sales from other transactions.

Comment 5, UCC § 9-109. In another context, this court has previously noted the confusion that can be caused by the UCC's use of the word "assignee" rather than "secured party"² and, given the flexible application of such terms in the code, it would be unreasonable to give them literal or dispositive meaning in commercial documents that are to some extent the progeny of the code.

Courts have recognized a number of factors or indicia that are helpful in considering whether a given transaction is an absolute assignment/sale or an assignment for security only. *See Wawel Savings Bank v. Jersey Tractor Trailer Training, Inc. (In re Jersey Tractor Trailer Training, Inc.)*, 2007 WL 2892956, at *7 (Bankr. D.N.J. September 28, 2007) and cases cited therein. The *Jersey Tractor* court identified the following factors that might help determine that a given sale of receivables is in reality a loan or financing transaction:

1. Language of the documents and conduct of the parties.
2. Recourse to the seller.
3. Seller's retention of servicing and commingling of proceeds.
4. Purchaser's failure to investigate the credit of the account debtor.
5. Seller's right to excess collections.
6. Purchaser's right to alter pricing terms.
7. Seller's retention of right to alter or compromise unilaterally the terms of the transferred assets.
8. Seller's retention of right to repurchase asset.

Id.

² *In re U.S. Aeroteam, Inc.*, 327 B.R. 852, 870-71 n. 17 (Bankr. S.D. Ohio 2005).

In the instant case, there is no disagreement that the transaction between TAB and Debtor was at least in part an absolute assignment or true sale. The only dispute is whether some of the receivables were merely subject to a security interest. Given this hybrid analysis, the factors listed above are of limited utility. Also, as in the *Jersey Tractor* case, the language of the Factoring Agreement and the conduct of the parties is so clear, that recourse to such general factors is not really necessary. The Factoring Agreement expressly provides for both types of transactions and the parties appear to have conducted their affairs accordingly.

In particular, the agreement clearly differentiates between “Purchased Accounts” and “Serviced Accounts” which are those accounts that are not specifically purchased. Purchases are at the discretion of TAB which selects the accounts it desires to purchase from a “Schedule of Accounts” which is defined as “a form supplied by Purchaser from time to time wherein Seller lists such of its Accounts as it requests that Purchaser purchase under the terms hereof, and from which Purchaser may elect to purchase all or any portion of said Accounts....” With respect to an account not purchased, a “Serviced Account,” TAB’s only obligation under the agreement is to “forward it to the Account Debtor, and to process any collections received by the Account Debtor on the Serviced Account.” TAB would charge a fee for collecting and administering the account and deposit the balance of the collections into Debtor’s reserve account.

It is true that all accounts were assigned to TAB and that all invoices were required to state that fact so that all payments would be sent to TAB, but as noted above, the term “assign” does not necessarily connote the nature of the commercial transaction. Not all assignments are sales and some, such as assignments merely for purposes of servicing or collection, are not even covered by Article 9.³ It is also not determinative that TAB had absolute control over the accounts. While the degree of control may be a factor in the analysis, it is not inconsistent with

³ In relevant part, the language of Utah Code Ann. § 70A-9a-109(4)(e) (2001) is as follows:

“(4) This chapter does not apply to:

(e) an assignment of accounts...which is for the purpose of collection only.”

the role of collection agent to have control of the accounts and the right to setoff costs and fees prior to remitting the net proceeds to the assignor.

The fact is that TAB and Debtor, in accordance with the clear language of the Factoring Agreement, differentiated between invoices, treating some as purchased and others as serviced. Those that were serviced were subject to a security interest that was perfected outside the 90-day preference period. At the time the garnishment order was served on Amstan, Star obtained a lien, second in priority to TAB, on the funds collected on accounts that had not been purchased by TAB. In answering the garnishment order, Amstan incorrectly assumed that TAB owned all of the accounts. The result is that once TAB released its security interest, Star became the first priority lien holder with a right to receive funds equal to the amount of its claim plus interest.

CONCLUSION

For all of the foregoing reasons, the court **GRANTS** the Motion for Summary Judgment (doc. 23) filed by Star Leasing Co. and **ORDERS** the Trustee to pay to Star the amount of \$12,971.70 plus interest to the extent funds are available from the account payable of Amstan currently held by the Trustee.

SO ORDERED.

cc:

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