UNITED STATES BANKRUPTCY COURT
MIDDLE DISTRICT OF NORTH CAROLINA
GREENSBORO DIVISION

IN RE:	)	
	)	
Asheboro Precision Plastics, Inc.,	)	Case No. 03-11319C-7G
	)	
Debtor.	)	
	)	
William P. Miller, Trustee,	)	
	)	
Plaintiff,	)	
	)	
v.	)	Adversary No. 04-2043
	)	
Van Dorn Demag Corp.,	)	
	)	
Defendant.	)	
	)	
Van Dorn Demag Corp.,	)	
	)	
Third Party Complainant,	)	
	)	
v.	)	
	)	
Asheboro Precision Plastics, Inc., a/k/a Wade Technical Molding, Inc.,	)	
	)	
Third Party Defendant.	)	

MEMORANDUM OPINION

This adversary proceeding comes before the court on cross-motions for summary judgment filed by the plaintiff, William P. Miller, the Chapter 7 Trustee ("Trustee") for Asheboro Precision Plastics, Inc. ("Debtor"), and the defendant, Van Dorn Demag Corp. ("Van Dorn"), over whether the Trustee can avoid Van Dorn's purported security interest in a plastic injection molding machine having an approximate value of $160,000.00.

The court held a hearing on the cross-motions for summary judgment on January 18, 2005, in Greensboro, North Carolina, at which time the court took the motions under advisement. After considering the arguments of the parties, the evidence attached to the cross-motions for summary judgment, and the relevant law, the court will deny Van Dorn's motion for summary judgment and grant the Trustee's motion for summary judgment in part under Rule 56(d) of the Federal Rules of Civil Procedure.

I. STANDARD OF REVIEW

Summary judgment is appropriate when the matters presented to the court "show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(c); Fed. R. Bankr. P. 7056; Celotex v. Catrett, 477 U.S. 317, 322 (1986). The party moving for summary judgment has the initial burden of proving that there is no genuine issue as to any material fact. Adickes v. S. H. Kress & Co., 398 U.S. 144, 161 (1970). Once the moving party has met this initial burden of proof, the non-moving party must set forth specific facts sufficient to raise a genuine issue for trial, and may not rest on its pleadings or mere assertions of disputed facts to defeat the motion. Matsushita Electric Industrial Co., Ltd., v. Zenith Radio Corp., 475 U.S. 574, 586-87 (1986) (stating that the party opposing the motion "must do more than simply show that there is some metaphysical doubt as to the material facts"). The mere existence of a scintilla of evidence in support of the opposing party's position will not be sufficient to forestall summary judgment, but "the judge's function is not himself to weigh the evidence and determine the truth of the matter but to determine whether there is a genuine issue for trial." Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 249, 252 (1986). In ruling on a motion for summary judgment, "the evidence of the nonmovant is to be believed, and all justifiable inferences are to be drawn in his favor." Id. at 255.

II. BACKGROUND

The Debtor operated a plastic manufacturing business. Among other items, the Debtor produced nail caps, lip balm containers, and clothes hangers. In November 2001, Debtor purchased a 500HT43-0653 plastic injection molding machine ("molding machine") from Van Dorn to use in its manufacturing business. The purchase price of the machine was $343,296.00 and Van Dorn attempted to secure the purchase price through a purchase money security interest. When it filed its financing statement, however, Van Dorn did not use the Debtor's legal name, "Asheboro Precision Plastics, Inc." Instead, Van Dorn used a deviation of the Debtor's trade name, "Wade Technical Molding," and filed the financing statement under the name "Wade Technical Molding, Inc."

Van Dorn alleges that it was induced by the Debtor's president, Gordon Wade, to believe that the name it used on the financing statement was in fact the Debtor's legal name. In support of that allegation, Van Dorn asserts that the Debtor frequently used the name "Wade Technical Molding" in its correspondence with Van Dorn, and that the Debtor utilized checks showing the account holder as "Wade Technical Molding, Inc." In his deposition, Gordon Wade testified that in 2001 he told Van Dorn that the Debtor was going to use the name "Wade Technical Molding" in all future transactions with its vendors and clients. Moreover, when Gordon Wade signed the security agreement with Van Dorn for the purchase of the molding machine, the security agreement was in the name of "Wade Technical Molding, Inc." and Gordon Wade signed as president of "Wade Technical Molding, Inc."

On the other hand, the Trustee, cites to some 14 documents transferred between the Debtor and Van Dorn in the six months prior to Van Dorn's December 17, 2001 financing statement that used the Debtor's legal name, "Asheboro Precision Plastics, Inc." Gordon Wade also testified that when he was able to convince Van Dorn to

accept a purchase money security interest in the molding machine, he provided Van Dorn with copies of the Debtor's recent tax returns and financial statements, which all listed the legal name of the Debtor as "Asheboro Precision Plastics, Inc."

Gordon Wade gave at least four reasons explaining why the Debtor wanted to operate under the name of "Wade Technical Molding" instead of its legal name. First, Gordon Wade stated that he had previously operated in the molding business under the "Wade" name but was prohibited from using that name pursuant to a non-competition agreement he signed when he sold that company. By 1999, that agreement had expired. Second, Gordon Wade found that those who dealt with the Debtor often confused "Asheboro" with "Asheville," which is another prominent municipality in North Carolina. Third, the Debtor was involved in some allegedly defective product litigation and Gordon Wade thought that using a different business name might purge any negative association that the name Asheboro Precision Plastics, Inc. might have engendered in future business relations. Fourth, the Debtor had plans to begin manufacturing lip balm containers - a business that Gordon Wade had previously developed under the "Wade" name - and he felt that the Debtor could capitalize on a considerable amount of goodwill by changing its name. When the Debtor spoke with an attorney about possibly changing its legal name, however, the Debtor was advised to adopt "Wade Technical Molding" as an assumed name rather than changing the corporation's name in order to avoid unnecessary expenses. That assumed name was registered in Randolph County on December 8, 1999.

Regarding his knowledge of the difference between the Debtor's legal name and the Debtor's assumed name when he executed the purchase money security interest in favor of Van Dorn, Gordon Wade stated that he knew the difference, but, "It just didn't register with me as being a problem or an issue . . . . I mean, obviously

it's just something I didn't really feel - apparently, I had overlooked it, obviously." (Wade Dep., p. 45-46). When Gordon Wade signed the security agreement in favor of Van Dorn as the president of "Wade Technical Molding, Inc." he stated that he "was not thinking about the legal issue of Asheboro Precision versus Wade Technical Molding." (Wade Dep., p. 91). When asked what he felt the Debtor's rights to the molding machine were, Gordon Wade responded that he believed Van Dorn had a right to repossess the equipment. (Wade Dep., p. 48).

On May 15, 2003, the Debtor filed its Chapter 11 bankruptcy. On August 1, 2003, Van Dorn moved for relief from the automatic stay of the Bankruptcy Code to permit it "to enforce its rights and remedies against the Collateral pursuant to the terms of the Loan Documents and applicable state law . . . ." (Document No. 113 in Case No. 03-11319). The matter was set for hearing on August 19, 2003, and was subsequently continued several times with the consent of the parties. In the interim, the parties entered several stipulations whereby Van Dorn consented to the Debtor's continued use of the molding machine provided that the Debtor made adequate protection payments to Van Dorn until the hearing on the motion for relief from the automatic stay was concluded. (Document Nos. 131, 143, 164 in Case No. 03-11319). Those interim adequate protection stipulations provided a cash payment to Van Dorn - usually $5,000.00 - and the orders explicitly provided that nothing therein constituted any adjudication, finding, or admission regarding whether Van Dorn had a perfected security interest in the property.[1] The last such order stated,

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[1] More specifically, the orders stated:
Nothing contained in this order constitutes an adjudication, finding, or admission by any party concerning any issues that have been raised or might be raised by the parties, included but not limited to the appropriate amount of adequate protection payments. All

> The Debtor shall make adequate protection payments in the amount of $5,000.00 per month to Van Dorn for the use of the collateral until the conclusion of the confirmation hearing on the Debtor's plan. In the event that any such adequate protection payment is not made, Van Dorn shall be entitled to bring this matter before the court on an expedited basis, which expedited basis shall not be objected to by the Debtor.

(Document No. 224 in Case No. 03-11319).

Meanwhile, the Debtor submitted an amended Chapter 11 plan of reorganization on February 17, 2004. The amended plan treated Van Dorn as a secured creditor in the molding machine, which the Debtor also proposed to retain. That plan, however, was never confirmed by the court because the Debtor agreed to entry of a consent order converting the case to Chapter 7 on April 6, 2004.[2] In connection with the order of conversion, the court granted Van Dorn relief from the automatic stay to "enforce its rights and remedies against the Collateral pursuant to the terms of the Loan Documents and applicable state law." (Document No. 317 in Case No. 03-11319).

Subsequently, on May 7, 2004, the Trustee filed a motion for rehearing on the court's order granting Van Dorn relief from stay because the Trustee had filed this adversary proceeding against Van Dorn to avoid its lien. On July 27, 2004, the parties agreed that the motion for rehearing was moot because the parties had agreed to allow the Trustee to sell the equipment to Sapona Plastics, Inc. for $160,000.00[3] and the parties agreed to transfer any liens to

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> such issues shall remain open for later determination by the court.

(Document No. 164 in Case No. 03-11319).

[2] The order of conversion was made effective as of April 16, 2004 to allow the Debtor time to finish some of its work orders and to allow for the orderly appointment of a Chapter 7 trustee.

[3] Van Dorn asserts that it was owed $208,469.83 on the molding machine as of the petition date. On August 1, 2003, Van Dorn filed proof of claim number 81 asserting that the Debtor owed it a total

the proceeds of that sale. Those proceeds are being held in the bankruptcy estate pending the outcome of this adversary proceeding.

III. DISCUSSION

The Trustee argues that he is entitled to summary judgment on his lien avoidance action on the basis that Van Dorn's financing statement covering the molding machine is seriously misleading and insufficient to perfect a security interest. Van Dorn argues that the court should grant it summary judgment on the grounds that the unconfirmed plan, the grant of its motion for relief from the automatic stay, and the interim stipulations agreed to by the parties related to that motion conclusively establish the validity and perfection of its lien in this adversary proceeding on the basis of res judicata. In the alternative, Van Dorn claims that the molding machine should be subject to a constructive trust based on the Debtor's alleged misrepresentation, which it claims is also a grounds for excepting its claim against the Debtor from the Debtor's discharge.

A. Res Judicata and Collateral Estoppel.

Van Dorn argues that the Debtor is prevented from challenging the validity of its security interest based on the fact that the Debtor's unconfirmed, pre-conversion Chapter 11 plan treated it as a secured creditor. Furthermore, Van Dorn argues that the stipulations between the parties pending adjudication of its motion for relief from the automatic stay, coupled with the court's eventual grant of that motion, also prevents the Trustee from challenging the validity of its security interest.

"Res judicata" means that a final judgment rendered on the merits by a competent court exists and that the judgment "is conclusive of causes of actions and of facts or issues thereby litigated, as to the parties and their privies . . . ." 46 Am.

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of $1,028,853.63.

Jur. 2d JUDGMENTS § 514 (2001). "Res judicata" has two parts:

> Claim preclusion prohibits a party from relitigating a previously adjudicated cause of action, and entirely bars a new lawsuit on the same cause of action. Issue preclusion, or collateral estoppel, applies to a subsequent suit between the parties on a different cause of action. Collateral estoppel prevents the parties from relitigating any issue that was actually litigated and finally decided in the earlier action. The issue decided in the earlier action must be identical to the one presented in the subsequent action. The most important criterion in determining whether two suits concern the same controversy is whether they both arose from the same transactional nucleus of facts. If so, the judgment in the first action is deemed to adjudicate, for purposes of the second action, every matter that was urged, and every matter that might have been urged, in support of the cause of action or claim in litigation.

Id. (footnotes omitted).

Generally, a confirmed Chapter 11 plan is binding on all parties in interest. 11 U.S.C. § 1141(a). See also Great Lakes Higher Educ. Corp. v. Pardee (In re Pardee), 218 B.R. 916, 925 (B.A.P. 9th Cir. 1998) (holding that while the Chapter 13 plan provision at issue should not have been confirmed, the plan provisions were "res judicata as to all issues that could have or should have been litigated at the confirmation hearing."), aff'd, 187 F.3d 648 (9th Cir. 1999). A confirmed plan also has the effect of superceding any previous stipulations between the parties on the grounds that the confirmed plan is the beginning of a debtor's new financial life and it either modifies or terminates previous legal relationships. In re Vandy, Inc., 189 B.R. 342, 348 (Bankr. E.D. Pa. 1995) (reasoning that the stipulations made by the parties pre-confirmation were not binding post-confirmation because the confirmed plan did not incorporate any of the previously stipulated terms). In contrast, an unconfirmed plan is not binding on any party and until confirmation it represents little more than a proposal. For example, the Debtor's proposed Chapter 11 plan of reorganization plainly states in Section 12.7 that "any concession

reflected herein is made for purposes of the Plan only, and if the Plan does not become effective, no party in interest in the Chapter 11 case shall be bound or deemed prejudiced by any such concession . . . ." (Document No. 261 in Case No. 03-11319).

Unlike a confirmed plan, which is binding on all parties in interest by statute, a motion for relief from the automatic stay is a summary proceeding and the implicit facts underlying the grant or denial of that motion are not binding on any party. As the legislative history to the 1978 Bankruptcy Act explains, the only issues before a court are "the lack of adequate protection, the debtor's equity in the property, and the necessity of the property to an effective reorganization of the debtor, or the existence of other cause for relief from the stay." S. Rep. No. 989, 95th Cong., 2d Sess. 53-55 (1978). The Report also admonishes that a hearing on a motion for relief from stay is not concerned with largely collateral or other unrelated matters "such as counterclaims against the creditor." Id. See also Grella v. Salem Five Cent Sav. Bank (In re The Beverly Corp.), 42 F.3d 26, 33-34 (1st Cir. 1994) (refusing to apply the doctrine of res judicata to a summary relief of stay motion when the issue that the creditor sought to have conclusively established ordinarily required an adversary proceeding under the Bankruptcy Rules; all that is required to lift the automatic stay is a colorable claim to estate property - it is not a proceeding to determine the underlying substantive claims); Estate Construction Co. v. Miller & Smith Holding Co., Inc., 14 F.3d 213, 219 (4th Cir. 1994) ("Hearings to determine whether the stay should be lifted are meant to be summary in character . . . . [C]ounterclaims such as fraud are not precluded later if not raised at this stage."); In re Vitreous Steel Prods. Co., 911 F.2d 1223, 1234 (7th Cir. 1990) ("Questions of the validity of liens are not generally at issue in a § 362 hearing, but only whether there is a colorable claim of a lien on

property of the estate.") (emphasis in original); Johnson v. Righetti (In re Johnson), 756 F.2d 738, 740 (9th Cir. 1985) ("The action seeking relief from the stay is not the assertion of a claim which would give rise to the right or obligation to assert a counterclaim . . . . [S]tate law governing contractual relationships is not considered in stay litigation."), cert. denied, 474 U.S. 828 (1985).

In this case, the Debtor's proposed Chapter 11 plan plainly states that any concession granted in the plan was not binding on any party unless the plan was confirmed. The plan was not confirmed and the case was converted from Chapter 11 to Chapter 7. Thus, the fact that the Debtor treated Van Dorn as having a secured claim in the molding machine in the unconfirmed plan cannot be a basis for the application of res judicata.

Likewise, consonant with the summary nature of a motion for relief from stay, all Van Dorn had requested of the court in seeking relief was that it be permitted "to enforce its rights and remedies against the Collateral pursuant to the terms of the Loan Documents and applicable state law." (Document No. 113 in Case No. 03-11319). Interim stipulations on the amount of adequate protection that Van Dorn was entitled to for Van Dorn's forbearance of prosecution and the Debtor's continued use of the equipment plainly stated that none of the collateral matters outside the amount of the adequate protection payment was binding on the parties. When the court granted Van Dorn relief from the automatic stay to pursue its interests outside of bankruptcy, the court never made any determination of the validity, nature, extent, or relative priority of Van Dorn's interests in the Debtor's property. Contrary to Van Dorn's reading of the last stipulation between it and the Debtor - that should the Debtor fail to make the adequate protection payment then "Van Doren shall be entitled to bring this matter before the court on a expedited basis, which expedited basis

shall not be objected to by the Debtor" - the court cannot see any merit in Van Dorn's position that the language is conclusive proof of a stipulation between it and the Debtor that would prevent the Trustee from later challenging the validity of Van Dorn's security interest. At most, this language provides only that the Debtor would not object to having the matter heard by the court on an expedited basis. Nothing in the plain language of the stipulation prevented the Debtor from raising any defenses that it might have to the motion for relief from the automatic stay.

Moreover, when the court granted Van Dorn relief from the automatic stay, it was done without objection from the Debtor. Having no real impediment to granting Van Dorn relief from the automatic stay, and having before it a colorable claim to the molding machine by Van Dorn, the court granted it relief. Importantly, the court's order only allowed Van Dorn to "enforce its rights and remedies against the Collateral pursuant to the terms of the Loan Documents and applicable state law." (Document No. 317 in Case No. 03-11319). The court never made any findings of fact regarding the validity of Van Dorn's interest in the molding machine. Accordingly, the issue of whether Van Dorn had a perfected security interest in the molding machine was never actually litigated, thus, an essential element of res judicata is missing. Nothing about the court's order granting Van Dorn relief from the automatic stay prevents the Trustee from attacking the validity of Van Dorn's lien in this adversary proceeding.[4]

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[4] Van Dorn cited Armstrong v. Norwest Bank, Minneapolis, N.A. (In re Trout), 964 F.2d 797 (8th Cir. 1992), for the proposition that the Debtor's stipulated adequate protections payments "posits the validity of [Van Dorn's] security interest." Trout is distinguishable from the facts of this case. In Trout, the Eighth Circuit held that a stipulation between the debtor and a bank that gave the bank a new lien on different property pursuant to a cash collateral agreement was res judicata to the validity of the bank's lien when the stipulation was objected to by other creditors,

B. Seriously Misleading Financing Statement.

The Trustee argues that Van Dorn's interest in the molding machine is not perfected on the basis that Van Dorn's use of the name "Wade Technical Molding, Inc." on its financing statement is seriously misleading when the Debtor's legal name is "Asheboro Precision Plastics, Inc." Using his powers as a judicial lien creditor pursuant to 11 U.S.C. § 544(a)(1), the Trustee argues that he has priority over Van Dorn's ostensible security interest. Van Dorn argues that its financing statement is sufficient to perfect its interest against the Trustee on the grounds that Van Dorn used the Debtor's correct corporate identification number, correct address, and a variant of the Debtor's trade name. Moreover, Van Dorn argues that the Trustee should be charged with notice of its interest in the molding machine because three of the seventeen filed financing statements listed under "Asheboro Precision Plastics, Inc." also list "Wade Technical Molding" as a debtor and

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approved over those objections, and affirmed on appeal. Id. at 799-801. The court acknowledges that if the issue of the validity of a lien is actually litigated by consent of the parties and the court within the context of a motion to lift the automatic stay then an adjudication on the merits might be res judicata in subsequent litigation. See, e.g., Pollack v. Federal Deposit Ins. Corp. (In re Monument Record Corp.), 71 B.R. 853, 854-55 (Bankr. M.D. Tenn. 1987) (holding that a stipulated order on a relief of stay motion submitted to all creditors for approval was res judicata to the validity of a particular creditor's lien when the validity of that lien was raised as an issue at a preliminary hearing by the debtor, and when the issue was litigated on the merits at the final hearing before the parties agreed to the stipulated order).

Here, unlike Trout and Monument Record, there was not any litigation over the validity of Van Dorn's lien associated with the relief of stay motion and the court never explicitly ruled on the issue. Indeed, had the issue of the validity of Van Dorn's purchase money security interest in the molding machine been at issue in the relief from stay motion, then Randolph Bank, which held a preexisting security interest in the Debtor's equipment, might have taken a keener interest in that litigation.

both of the names on those financing statements have the same address. According to Van Dorn, if the Trustee had acted as a prudent creditor, then the Trustee would have searched the public records under "Wade Technical Molding," which would have revealed its financing statement.

A financing statement is sufficient to perfect an interest in personal property under North Carolina law when it provides the name of the debtor, the name of the secured party or representative, and indicates the collateral covered by the financing statement. N.C. Gen. Stat. § 25-9-502. Using a debtor's correct name is important because financing statements are indexed under the name of the debtor. When the debtor is a registered organization, a financing statement sufficiently provides the name of a debtor if the debtor's name is the one "indicated on the public record of the debtor's jurisdiction of organization which shows the debtor to have been organized . . . ." N.C. Gen. Stat. § 25-9-503(a)(1). "A financing statement that provides only the debtor's trade name does not sufficiently provide the name of the debtor." N.C. Gen. Stat. § 25-9-503(c). See also Pearson v. Salina Coffee House, Inc., 831 F.2d 1531, 1536 (10th Cir. 1987) (stating that the rigid requirement that a debtor's legal name be used on a financing statement fulfills the notice objective of the central filing system and that certainty is lost if equitable exceptions are created that allow trade name filings; the burden on the creditor to ascertain a debtor's correct name is not serious).

Before the most recent revisions to Article 9, the use of a trade name in a financing statement could be sufficient to perfect a security interest depending on the circumstances of a particular case. See, e.g., Unsecured Creditor's Comm. v. Marepcon Financial Corp. (In re Bumper Sales, Inc.), 907 F.2d 1430, 1434-35 (4th Cir. 1990) (holding that a creditor's use of Marepcon's trade name, Norshipco, was not seriously misleading because a prospective

creditor would have seen both names used on the financing statements, the same address was used for both names, and the trade name was filed with the State Corporation Commission - a reasonably diligent searcher could ascertain that the two names were for the same entity). The Official Analysis to Revised Article 9-503, however, states that the revision - effective in North Carolina as of July 1, 2001[5] - would "override cases . . . upholding trade name filings in circumstances where the courts believed that a searcher should have searched under a trade name." 1-1 UCC 1998 Rev. Art. 9: Text, Comments & Analysis § 9-503. See, e.g., Clark v. Deere & Co. (In re Kinderknecht), 308 B.R. 71, 75 (B.A.P. 10th Cir. 2004) (rejecting the notion that a commonly used nickname could be the debtor's name based on the revised Uniform Commercial Code's "desire to foreclose fact-intensive tests, such as those that existed under the former Article 9 of the UCC, inquiring into whether a person conducting a search would discover a filing under any given name."); In re FV Steel and Wire, Co., 310 B.R. 390, 391-394 (Bankr. E.D. Wis. 2004) (opining that the use of the trade name, "Keystone Steel & Wire Co.," would be seriously misleading under revised Article 9 when the debtor's legal name was "Keystone Consolidated Industries, Inc.," on the grounds that a searcher would not find the creditor's financing statement by searching under the debtor's legal name); G. Ray Warner, Using the Strong-arm Power to Attack Name Errors Under Revised Article 9, 20-8 Am. Bankr. Inst. L.J. 22 (October 2001) ("Under the new standard, a name error is fatal if a search under the correct name, using the filing office's standard search logic, would not disclose the financing statement."); Steven L. Harris & Charles W. Mooney, Jr., Revised Article 9 Meets the Bankruptcy Code: Policy and Impact, 9 Am. Bankr. Inst. L. Rev. 85, 105 n. 117 (Spring 2001) (explaining

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[5] N.C. Gen. Stat. § 25-9-701.

that cases arising under former Article 9 would come out differently under Revised Article 9; even if a manual search of the record would reveal the financing statement, the results of a manual search are irrelevant if the financing statement is not disclosed under the relevant computer search).

The purpose of a financing statement is to provide notice to third parties that the creditor has an interest in the debtor's property. Mountain Farm Credit Serv. v. Purina Mills, Inc., 459 S.E.2d 75, 80 (N.C. Ct. App. 1995). A creditor's use of a debtor's legal name need not be exact; a financing statement is valid despite having minor errors unless the errors are seriously misleading. N.C. Gen. Stat. § 25-9-506(a). A financing statement is deemed seriously misleading whenever the financing statement fails to sufficiently provide the name of the debtor in accordance with Section 9-503(a), but if a search of the public records under the debtor's correct name "would disclose a financing statement that fails sufficiently to provide the name of the debtor in accordance with [Section 9-503(a)], the name provided does not make the financing statement seriously misleading." N.C. Gen. Stat. § 25-9-506(b-c). See, e.g., Terry M. Anderson, Marianne B. Culhane, & Catherine Lee Wilson, Attachment and Perfection of Security Interests Under Revised Article 9: A "Nuts and Bolts" Primer, 9 Am. Bankr. Inst. L. Rev. 179, 204-05 (Spring 2001) ("[I]f the search logic of the office means that a search under 'AB-C Inc.' will not find the ABC Ltd. variant, then the financing statement will be seriously misleading and ineffective.").

As alleged by Van Dorn, a prudent searcher of North Carlina's financing statements would be able to discern that three of the seventeen financing statements filed under "Asheboro Precision Plastics, Inc." also cross-referenced a debtor known as "Wade Technical Molding." Searching under "Wade Technical Molding" would reveal a financing statement for "Wade Technical Molding, Inc.,"

which had the same corporate identification number and same address as "Asheboro Precision Plastics, Inc." Admittedly, however, a search under "Asheboro Precision Plastics, Inc." by itself would not reveal Van Dorn's financing statement.

Under Revised Article 9 and the underlying policy of simplifying financing statement searches, Van Dorn's use of the purported trade name, "Wade Technical Molding, Inc.," in place of the Debtor's legal name, "Asheboro Precision Plastics, Inc.," renders Van Dorn's financing statement seriously misleading and hence ineffective. As a consequence, the security interest of Van Dorn may be avoided by the Trustee.

C. Misrepresentation/Fraud and Constructive Trust.

Van Dorn asserts in its counterclaim that it is entitled to have a constructive trust imposed upon the molding machine in question based upon fraudulent conduct on the part of the Debtor. Van Dorn claims that the Debtor's alleged misrepresentation regarding its name constitutes a material false pretense, false representation or actual fraud which entitles Van Dorn to a constructive trust. As the beneficiary of a constructive trust, Van Dorn argues that it has rights superior to the rights of the Trustee. In disputing Van Dorn's assertions, the Trustee argues that Van Dorn has failed to state a claim on which relief can be granted because Van Dorn did not allege its fraud-based claim with particularity and, alternatively, that as a matter of law Van Dorn cannot establish all the elements of a claim for fraud or misrepresentation.

1. Particularity.

One of the primary purposes for requiring that fraud be pled with particularity is to provide a detailed notice of the fraud claim to the defending party. Tuchman v. DSC Communications Corp., 14 F.3d 1061, 1067 (5th Cir. 1994) (stating that the "heightened pleadings standard provides defendants with fair notice of the

plaintiff's claims, protects defendants from harm to their reputation and goodwill, reduces the number of strike suits, and prevents plaintiffs from filing baseless claims and then attempting to discover unknown wrongs."). The requirements of particularity vary depending on the facts of a particular case, but at a minimum, a party should allege "'the time, place, and contents of the false representations, as well as the identity of the person making the misrepresentation and what he obtained thereby.'" Harrison v. Westinghouse Savannah River Co., 176 F.3d 776, 784 (4th Cir. 1999) (citation omitted). While fraud is to be pled with particularity, conditions of the mind may be averred generally. Fed. R. Civ. P. 9(b); Fed. R. Bankr. P. 7009.

The pith of Van Dorn's fraud-based claim is that the Debtor misrepresented its legal name, which enabled the Debtor to obtain the molding machine from Van Dorn pursuant to documents which, as a result of such false representation, were insufficient to perfect the security interest that was intended. In support of that claim, Van Dorn specifically alleged the time and place of the alleged misrepresentation - where the November 27, 2001 security agreement was executed. The content of the alleged misrepresentation is that the Debtor represented itself to be "Wade Technical Molding, Inc." when no such entity existed. The parties to the misrepresentation are the Debtor's president, Gordon Wade, and Van Dorn. Finally, Van Dorn alleges that it detrimentally relied on the Debtor's representations regarding its legal name inasmuch as it used the wrong name when it prepared and filed a financing statement to perfect its interest in the molding machine which the Debtor obtained through the false representation. While Van Dorn never specifically pleaded the Debtor's state of mind, Van Dorn did describe the alleged misrepresentation as "false." When used as an adjective, "false" means "deceitful." Black's Law Dictionary 635 (8th ed. 2004). In turn, a "deceit" is the "act of intentionally

giving a false impression." Black's Law Dictionary 435 (8th ed. 2004). Thus, based on the particular facts of this case, the court finds that Van Dorn sufficiently pled its fraud-based claim to meet the minimum threshold requirements of Rule 9(b) of the Federal Rules of Civil Procedure.

2. Constructive Trust.

Alternatively, the Trustee argues that even if Van Dorn's pleading satisfies the heightened standards for alleging a fraud-based claim, the Trustee is nonetheless entitled to summary judgment on the basis that the record establishes as a matter of law that the type of misconduct required in order to establish a constructive trust is not present in this proceeding. In short, the Trustee maintains that the depositions and other materials in the record show without dispute that there was no fraud on the part of Debtor's representative, Mr. Wade.

Generally, constructive trusts are imposed by courts of equity to prevent unjust enrichment to a title holder of property when the title holder acquired that title through fraud - or some other breach of duty - that makes it inequitable for the title holder to assert a claim to that property against the beneficiary of the constructive trust. See Roper v. Edwards, 373 S.E.2d 423, 424-25 (N.C. 1988). Determining the type of conduct that will give rise to a constructive trust or other equitable interest is a matter that is controlled by state law. See Old Republic Nat'l Title Ins. Co. v. Tyler (In re Dameron), 155 F.3d 718, 722 (4th Cir. 1998) ("[W]hat constitutes an "equitable interest" subject to exclusion from the bankruptcy estate under § 541(d) is a question of state law."). It is well established under North Carolina law, that a fraudulent misrepresentation may give rise to a constructive trust in favor of the injured party. See Guy v. Guy, 411 S.E.2d 403, 406 (N.C. Ct. App. 1991) (stating that a fraudulent misrepresentation will support the imposition of a constructive trust); Ferguson v.

Ferguson, 285 S.E.2d 288, 291-92 (N.C. Ct. App.) (holding that the making of a promissory representation would support the imposition of a constructive trust when the defendant did not intend to comply with the promise and when it was made to induce the plaintiff to act), disc. rev. denied, 294 S.E.2d 207 (N.C. 1982). Further, if a constructive trust is imposed on property in the possession of a wrongdoer, then the wrongdoer is deemed only to have naked legal title - as trustee - and the equitable interest to that property remains with the injured party. See Garner v. Phillips, 47 S.E.2d 845, 846 (N.C. 1948) ("[T]he wrongdoer[,] a constructive trustee, hold[s] only the naked legal title for the benefit of those next entitled."). Thus, if Van Dorn is to succeed with its claim for a constructive trust, it must establish that grounds exist under North Carolina law for the imposition of a constructive trust, i.e., that the transaction in which the Debtor acquired the Van Dorn molding machine was tainted with fraudulent misrepresentation or fraud to the extent that it would be inequitable for the Debtor to retain the machine.

Under North Carolina law, a party proves a claim for fraudulent misrepresentation when that party establishes the existence of five elements: "(1) false representation or concealment of a material fact, (2) reasonably calculated to deceive, (3) made with intent to deceive, (4) which does in fact deceive, and (5) resulting in damage to the injured party." Pearce v. American Defender Life Ins. Co., 343 S.E.2d 174, 178 (N.C. 1986). The record before the court reflects that Van Dorn submitted sufficient evidence in response to the Trustee's motion for summary judgment to make such a showing. First, Van Dorn demonstrated that Gordon Wade wrongfully represented the Debtor's legal name to be "Wade Technical Molding, Inc." on the signed security agreement when in fact the Debtor's legal name was "Asheboro Precision Plastics, Inc." Second, the wrongful

representation was "reasonably calculated to deceive" at least inasmuch as it made Van Dorn more likely or apt to believe that the Debtor's legal name was "Wade Technical Molding, Inc." Third, whether or not the wrongful representation was made with the intent to deceive requires the weighing of the evidence in contravention of the standards for ruling on a motion for summary judgment. Gordon Wade testified that he did not have any intent to deceive Von Dorn, that he had just "overlooked" the difference between "Asheboro Precision Plastics, Inc." and "Wade Technical Molding, Inc.," and that he had always thought that Van Dorn had the right to repossess the molding machine. On the other hand, Van Dorn asserts that those self-serving statements are outweighed by the surrounding circumstances. In short, Van Dorn asked Gordon Wade what the Debtor's legal name was, Gordon Wade knew the difference between a legal name and an assumed name, and Gordon Wade instructed Van Dorn to use the wrong legal name. Fourth, the fact that Van Dorn filed its financing statement under the wrong legal name is evidence that Van Dorn was deceived. In support of reasonableness of its false impression, Van Dorn demonstrated that the Debtor used checks in the name of "Wade Technical Molding, Inc." and that Gordon Wade had specifically instructed Van Dorn that the Debtor would be doing business in the future as "Wade Technical Molding." The Trustee, however, argues that any deception claimed by Van Dorn was not reasonable. The Trustee details the reasons that the Debtor assumed a different name - which were largely unrelated to the security agreement the Debtor signed with Van Dorn - and cites to numerous documents transferred between the parties showing the Debtor's legal name to be "Asheboro Precision Plastics, Inc." Also, when Gordon Wade testified that when he was able to convince Van Dorn to accept a purchase money security interest in the molding machine, he provided Van Dorn with a copies of the Debtor's recent tax returns

and financial statements, which all listed the Debtor's legal name. A determination of whether or not Van Dorn was deceived by the Debtor's alleged misrepresentation requires the court to weigh the evidence and resolve an issue of material fact. Finally, the parties do not dispute that Van Dorn suffered an injury inasmuch as it filed a seriously misleading financing statement which is now the focus of the Trustee's lien avoidance action.

Van Dorn thus has projected evidence which is sufficient to raise a genuine issue for trial with respect to its claim for fraudulent misrepresentation and constructive trust. Should Van Dorn establish at trial that it is entitled to a constructive trust, the Trustee, as representative of the bankruptcy estate, would hold only legal title to the molding machine and would have no equitable interest in the molding machine. Under such a scenario, Van Dorn would be entitled to recover the proceeds that have been realized from the molding machine from the estate.[6] See In re Mid Atlantic Supply Co., 790 F.2d 1121, 1126 (4th Cir. 1986). It follows that the Trustee is not entitled to summary judgment as to Van Dorn's constructive trust counterclaim and that the entitlement to the molding machine proceeds will depend upon the outcome of the trial of such counterclaim.

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[6]Under North Carolina law, a constructive trust is deemed to arise immediately upon the wrongful conduct giving rise to the constructive trust and not when the judgment recognizing the constructive trust is entered. See Cline v. Cline, 255 S.E.2d 399, 404 (N.C. 1979). Consequently, an intervening lien that arises between the time of the wrongful conduct and the entry of the constructive trust judgment does not take precedence over the constructive trust. See United Carolina Bank v. Brogan, 574 S.E.2d 112, 115 (N.C. App. 2002). Hence, any constructive trust that might be imposed in this proceeding would date back to the time of the alleged pre-petition fraud and predate the Trustee's hypothetical judicial lien that arose under § 544 when the Debtor's bankruptcy case was filed.

D. Exception to Discharge.

In its counterclaim against the Trustee and third-party complaint against the Debtor, Van Dorn requested relief in the form of "[a] declaration that the debt secured by the machine is non-dischargeable based upon the Debtor's conduct . . . ." In his motion for summary judgment, the Trustee argues correctly that there is no basis for such a claim since no discharge is available in this case in any event.

In a Chapter 7 proceeding, a discharge is not available for a corporation. 11 U.S.C. § 727(a)(1) ("The court shall grant the debtor a discharge, unless- (1) the debtor is not an individual . . ."); HR Rep. No. 595, 95th Cong., 1st Sess. 384-385 (1977); S. Rep. No. 909, 95th Cong, 2d Sess. 98099 (1978) (reporting that the law was changed to prevent corporations from obtaining a Chapter 7 discharge to avoid trafficking in corporate shells and bankrupt partnerships). See also Friedman v. Commissioner, 216 F.3d 537, 548 n.7 (6th Cir. 2000) ("New Manchester, as a corporate debtor, cannot obtain a "discharge" under the chapter 7 petition it filed with the Bankruptcy Court . . . ."); NLRB v. Better Bldg. Supply Corp., 837 F.2d 377, 378-79 (9th Cir. 1988) (same).

Therefore, inasmuch as the Debtor is a corporation in bankruptcy under Chapter 7 of the Bankruptcy Code, there is no need to attempt to except the debt from discharge because the Debtor is not eligible to receive a discharge in the first instance.

IV. CONCLUSION

Nothing in the Debtor's unconfirmed Chapter 11 plan, the interim stipulations of the parties or the court's eventual grant of Van Dorn's motion for relief from stay prevents the Trustee from attacking the validity of Van Dorn's purported security interest in the Debtor's molding machine. Consonant with the Trustee's motion for summary judgment, the court finds that there is no genuine

issue of material fact as to whether Van Dorn's financing statement is seriously misleading under Revised Article 9 and that the Trustee is entitled to a partial summary judgment on the issue of the validity of the Van Dorn security interest. However, there are material issues of fact with respect to Van Dorn's constructive trust counterclaim which preclude summary judgment as to the counterclaim and which leaves for trial whether there has been misrepresentation or fraud on the part of the Debtor which warrants the imposition of a constructive trust. Finally, there is no legal basis for Van Dorn's dischargeability claim and the Trustee therefore is entitled to summary judgment as to that claim.

This memorandum opinion constitutes the court's findings of fact and conclusions of law. A separate order shall be entered pursuant to Fed. R. Bankr. P. 9021 and Fed. R. Civ. P. 56(d).

This 1ST day of March, 2005.

William L. Stocks

WILLIAM L. STOCKS
United States Bankruptcy Judge

UNITED STATES BANKRUPTCY COURT
MIDDLE DISTRICT OF NORTH CAROLINA
GREENSBORO DIVISION

IN RE:	)	
	)	
Asheboro Precision Plastics, Inc.,	)	Case No. 03-11319C-7G
	)	
Debtor.	)	
	)	
William P. Miller, Trustee,	)	
	)	
Plaintiff,	)	
	)	
v.	)	Adversary No. 04-2043
	)	
Van Dorn Demag Corp.,	)	
	)	
Defendant.	)	
	)	
Van Dorn Demag Corp.,	)	
	)	
Third Party Complainant.	)	
	)	
v.	)	
	)	
Asheboro Precision Plastics, Inc., a/k/a Wade Technical Molding, Inc.,	)	
	)	
Third Party Defendant.	)	

ORDER

Consistent with the Memorandum Opinion entered contemporaneously herewith, it is ORDERED, ADJUDGED AND DECREED as follows:

1. The Motion to Dismiss Counterclaim and Third Party Complaint and Motion for Judgment on the Pleadings filed by William

P. Miller, the Chapter 7 Trustee for Asheboro Precision Plastics, Inc. (Document No. 14), which was later converted into a Motion for Summary Judgment (Document No. 27) be and hereby is GRANTED IN PART AND DENIED IN PART as follows:

(a) The financing statement filed by Van Dorn Demag Corp. to perfect its interest in Asheboro Precision Plastics, Inc.'s 500HT43-0653 plastic injection molding machine is seriously misleading and ineffective and, as a result, the security interest of Van Dorn may be avoided by the Trustee;

(b) Van Dorn Demag Corp.'s counterclaim and third-party complaint alleging that Asheboro Precision Plastics, Inc.'s debt to it should be excepted from discharge under Chapter 7 of the Bankruptcy Code is DISMISSED;

(c) In all other respects, the Motion for Summary Judgment filed by William P. Miller, the Chapter 7 Trustee for Asheboro Precision Plastics, Inc. is DENIED; and

2. The Motion for a Judgment on the Pleadings and the Cross-Motion for a Judgment on the Pleadings filed by Van Dorn Demag Corp. (Document No. 17), which was later converted into a Cross-Motion for Summary Judgment (Document No. 27) be and hereby is DENIED.

This 1st day of March, 2005.

William L. Stocks

WILLIAM L. STOCKS
United States Bankruptcy Judge