

UNITED STATES BANKRUPTCY COURT  
MIDDLE DISTRICT OF NORTH CAROLINA  
GREENSBORO DIVISION

IN RE: )

Osaka's Sushi Bar and )  
Japanese Cuisine, Inc. d/b/a )  
Osaka's Sushi Bar, )  
Debtor. )

Case No. 03-12440C-7G

Charles M. Ivey, III, )  
Chapter 7 Trustee in )  
Bankruptcy for Osaka's Sushi )  
Bar and Japanese Cuisine, )  
Inc. d/b/a Osaka's Sushi Bar, )

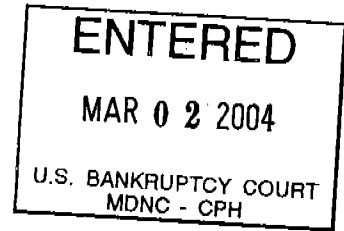
Plaintiff, )

v. )

Randy O'Connor, )

Defendant, )

Adversary No. 03-2077



MEMORANDUM OPINION

This adversary proceeding came before the court on February 17, 2004, for hearing upon a motion for summary judgment filed by the Plaintiff. J. Marshall Shelton appeared on behalf of the Plaintiff and David W. McDonald appeared on behalf of the Defendant. Having considered the Plaintiff's motion, the materials submitted in support of and in opposition to the motion, the brief filed by the Plaintiff, and the arguments of counsel, the court finds and concludes as follows:

JURISDICTION

The court has jurisdiction over the subject matter of this

proceeding pursuant to 28 U.S.C. §§ 151, 157 and 1334, and the General Order of Reference entered by the United States District Court for the Middle District of North Carolina on August 15, 1984. The motion for summary judgment which is now before the court involves a core matter which this court may hear and determine pursuant to 28 U.S.C. § 157(b)(2)(A) and (K).

#### PROCEDURAL BACKGROUND

On July 18, 2003, Osaka's Sushi Bar and Japanese Cuisine, Inc. d/b/a Osaka's Sushi Bar ("Debtor") filed a voluntary petition for relief under Title 11, Chapter 7 of the United States Code. The Plaintiff is the duly appointed and qualified Chapter 7 trustee for the Debtor.

On August 22, 2003, the Trustee filed a complaint against the Defendant seeking to avoid a security interest claimed by the Defendant in the Debtor's fixtures, furniture and equipment. The complaint alleges that the Defendant failed to perfect a security interest in the Debtor's furniture, fixtures and equipment because the Defendant failed to file a UCC financing statement with the North Carolina Secretary of State. The Plaintiff alleges that the security interest and lien claimed by the Defendant therefore is avoidable under § 544 of the Bankruptcy Code.

#### FACTUAL BACKGROUND

On April 10, 2001, the Debtor and the Defendant entered into a financial transaction in which the Defendant loaned the Debtor

\$30,000.00 and the Debtor purported to grant the Defendant a security interest in all the Debtor's fixtures, furniture, and equipment to secure such loan. Also on April 10, 2001, the Defendant filed a UCC financing statement with the Register of Deeds for Guilford County, North Carolina. Defendant did not file a UCC financing statement with the North Carolina Secretary of State's Office regarding the Debtor's property at any time prior to the filing of the Debtor's bankruptcy petition. On September 27, 2003, this court entered an order authorizing the Trustee to conduct a private sale of the Debtor's personal property, and transferring any liens on the property to the proceeds of the sale. The Debtor's property which was sold by the Trustee pursuant to that order did not include any fixtures.

#### SUMMARY JUDGMENT STANDARD

Under Rule 56 of the Federal Rules of Civil Procedure which is incorporated into Rule 7056 of the Federal Rules of Bankruptcy Procedure, summary judgment is proper when there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law. "Where the moving party has carried its burden of showing that the pleadings, depositions, answers to interrogatories, admissions and affidavits in the record construed favorably to the nonmoving party, do not raise a genuine issue of material fact for trial, entry of summary judgment is appropriate." Gutierrez v. Lynch, 826 F.2d 1534, 1536 (6th Cir. 1987) (citing

Celotex Corp. v. Catrett, 477 U.S. 317, 322-23, 106 S.Ct. 2548, 2552, 91 L.Ed.2d 265 (1986)). See also In re Specialty Retail Concepts, Inc., 108 B.R. 104, 106-07 (W.D.N.C. 1989); In re Caucus Distributors, Inc., 83 B.R. 921, 926 (Bankr. E.D. Va. 1988).

#### DISCUSSION

Under § 544(a) of the Bankruptcy code, the Chapter 7 Trustee is granted the rights and powers of a hypothetical lien creditor as of the date the bankruptcy petition is filed. See 11 U.S.C. § 544(a)(1) (2003). When a creditor fails to perfect its security interest under the applicable state law prior to the filing of the petition, a Trustee may use the avoidance power under § 544 to set aside the unperfected interest. See In re A & N Lumber Co., 266 B.R. 337, 340-41 (Bankr. M.D.N.C. 2001). Since the property involved in this proceeding was located in North Carolina at the time of the transaction in question, the applicable state law in this case is that of North Carolina. See Id. at 341 (the applicable law is "the law of the situs where the property is located").

#### I. Sufficiency of the Financing Statement

Under former Article 9 of the UCC, which was the applicable law in North Carolina at the time of the transaction in this case, a financing statement was required to be signed by the debtor in order to be valid. See In re Lea Lumber & Plywood LLC, 266 B.R. 342, 344 (Bankr. E.D.N.C. 2001); N.C. Gen. Stat. § 25-9-402(1)

(2000). North Carolina cases interpreting this requirement "establish[ed] the bright line rule that a financing statement is void if the debtor's signature is completely absent." Lea Lumber, 266 B.R. at 348. Although a corporate debtor's signature need not be perfect, "the typed name of the debtor, standing alone, does not constitute the debtor's signature." Id. See also Provident Finance Co. v. Beneficial Finance Co., 36 N.C.App. 401, 408, 245 S.E.2d 510, 515 (1978); Little v. County of Orange, 31 N.C.App. 495, 498-99, 229 S.E.2d 823, 825 (1976). The financing statement filed by the Defendant contained only the Debtor's typed name and therefore was invalid under the former Article 9.

Revised Article 9, effective July 1, 2001, in North Carolina, allows for the perfection of security interests which had attached but were unperfected prior to its effective date due to an insufficient financing statement. See N.C. Gen. Stat. § 25-9-704 (2003). If a financing statement was invalid under the former Article 9 but meets the new requirements for perfection and is filed in the proper filing office under Revised Article 9, the security interest would become perfected as of July 1, 2001. See Id. As Revised Article 9 does not require the debtor's signature on the financing statement, the financing statement filed in this case would create a perfected security interest as of July 1, 2001 if filed in the proper location under Revised Article 9. See Lea Lumber, 266 B.R. at 349. However, no such perfection occurred

because, as discussed below, Defendant's financing statement was not filed in accordance with Revised Article 9.

## II. Sufficiency of the Place of Filing

Even if the Debtor had signed the financing statement, the Defendant's security interest would not be perfected unless the financing statement was filed in the proper location. Under the former Article 9, if a debtor had a place of business in only one county, in order to perfect an interest in non-fixture goods of such a debtor, a creditor was required to file a copy of the financing statement with both the Secretary of State's office and with the Register of Deeds of the county in which the debtor had its place of business. See N.C. Gen. Stat. § 25-9-401(1)(c) (2000). While filing a valid financing statement solely with the Office of the Register of Deeds would have been sufficient to perfect a security interest in fixtures under the former Article 9, such a filing would not be effective as to any collateral which was non-fixture goods. See N.C. Gen. Stat. § 25-9-401(1)(b) and (2) (2000). The Defendant did not file the financing statement with the Secretary of State's office and therefore the creditor's security interest in the Debtor's furniture and equipment was unperfected under former Article 9.

A security interest which was unperfected prior to the effective date due to improper filing or insufficient content under the former Article 9 nevertheless becomes perfected if it meets the

content and filing requirements of Revised Article 9. See N.C. Gen. Stat. § 25-9-704 and 705(b) (2003). However, under Revised Article 9, all filings, with the exception of filings relating to real property such as mortgages, fixture filings, or filings relating to as-extracted collateral or timber to be cut, are required to be filed in the Secretary of State's office. See N.C. Gen. Stat. § 25-9-501. As Defendant did not file a copy of a valid financing statement with the Secretary of State's office, the Defendant's security interest in the Debtor's furniture and equipment was not perfected under either the former or Revised Article 9 at the time the Debtor filed its petition. It follows that the Plaintiff is entitled to utilize his § 544(a)(1) strong-arm powers to avoid the Defendant's security interest.

#### CONCLUSION

In accordance with the foregoing, the court concludes that the Plaintiff's Motion for Summary Judgment should be granted to the extent that the Plaintiff seeks adjudication that the Defendant's claim of lien upon the Debtor's furniture and equipment should be avoided, that a summary judgment should be entered in this adversary proceeding adjudging that the security interest and lien of Randy O'Connor is void and of no effect, and that the Plaintiff is entitled to the proceeds realized from the sale of the Debtor's furniture and equipment. To the extent that the Plaintiff's motion seeks to recover attorney's fees from the Defendant, the motion

will be denied as the Plaintiff has shown no legal or factual basis for such an award.

This 15<sup>th</sup> day of March, 2004.

**William L. Stocks**

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WILLIAM L. STOCKS  
United States Bankruptcy Judge

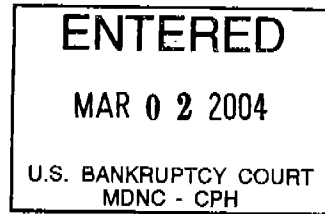


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Defendant, )

Adversary No. 03-2077

JUDGMENT

In accordance with the memorandum opinion filed contemporaneously herewith, it is ORDERED, ADJUDGED AND DECREED as follows:

(1) Plaintiff's motion for summary judgment is granted and judgment is hereby entered in favor of the Plaintiff to the extent the Plaintiff seeks avoidance of the Defendant's liens on the Debtor's furniture and equipment;

(2) The security interest and lien asserted by the Defendant upon the Debtor's furniture and equipment is adjudged to be void and of no effect;

(3) Plaintiff shall have and recover for the benefit of the estate the proceeds realized from the sale of the Debtor's furniture and equipment which was authorized by previous order of this court;

(4) Plaintiff's motion for summary judgment is denied to the extent that the Plaintiff seeks to recover attorney's fees from the Defendant; and

(5) Defendant's counterclaims are dismissed.

This 1<sup>st</sup> day of March, 2004.

William L. Stocks

WILLIAM L. STOCKS  
United States Bankruptcy Judge