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OPINION.

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United States Court of Appeals, Ninth Circuit.

**Edward C. HOSTMANN, Trustee of the
Bankruptcy Estate of WS Inc., Plaintiff-
Appellant,**

v.

**CAPITAL CONSULTANTS, INC., an Oregon
corporation; Cascade General Inc., an
Oregon corporation, Defendants-Appellees.**

No. 98-35727.

D.C. No. CV-98-00756-MFM.

Argued and Submitted Friday, July 16, 1999.

Decided Sept. 10, 1999.

Appeal from the United States District Court for the District of Oregon, Malcolm F. Marsh, District Judge, Presiding.

Before GOODWIN, LEAVY and TASHIMA,
Circuit Judges.

MEMORANDUM [FN1]

FN1. This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as may be provided by 9th Cir. R. 36-3.

**1 In this bankruptcy appeal, we consider whether the defendants successfully obtained and preserved a security interest in two of the debtor's assets, namely two claims against third parties for payment for services rendered by the debtor, to insulate the proceeds of those claims from the reach of the debtor's bankruptcy trustee. On stipulated facts, the bankruptcy court found in favor of the defendants. The parties then appealed to the district court, which affirmed the judgment. We have jurisdiction pursuant to 28 U.S.C. § 158(d), and reverse in part and affirm in part the judgment of the

bankruptcy court.

We review independently the decision of the bankruptcy court, without deference to the decision of the district court. In re Lewis, 113 F.3d 1040, 1043 (9th Cir.1997). Findings of fact are reviewed for clear error, while conclusions of law are reviewed de novo. In re Claremont Acquisition Corp., 113 F.3d 1029, 1031 (9th Cir.1997).

West State, Inc. ("WSI" or "the Debtor") was a ship repair business based in the Port of Portland. During 1993 and 1994, WSI engaged in three transactions that restructured several large debts owed to Capital Consultants, Inc. ("CCI"). Because the extensive details of these transactions are well known to the parties, we do not discuss them in detail here.

An involuntary petition for bankruptcy was filed against WSI under Chapter 7 on October 27, 1994. Edward Hostmann, the Debtor's Chapter 7 trustee ("the Trustee"), initiated this proceeding against two of the Debtor's creditors, Capital Consultants, Inc. ("CCI") and Cascade General, Inc. ("Cascade"), in an attempt to avoid their interest in several outstanding claims held by the Debtor against third parties for payment for repair services rendered. This appeal concerns the bankruptcy court's findings in favor of the creditors with regard to two specific claims, referred to as the Government Contract Claim and the ARCO Alaska Claim.

Oregon's Commercial Code provides that, in order for a security interest to attach, three events must take place: (1) the debtor must sign a written instrument describing the collateral (i.e., a security agreement); (2) the creditor must give value; and (3) the debtor must have rights in the collateral. ORS § 79.2030(1); see also Bank of the West v. Commercial Credit Financial Services, Inc., 852 F.2d 1162, 1166 (9th Cir.1988). Perfection does not occur until the parties file a financing statement with the Secretary of State. ORS § 79.4010. The financing statement must disclose the name and signature of the debtor, the address of the secured party (to facilitate further inquiry by a potential creditor), and a statement describing the collateral. OR § 79.4020. A secured party's interest in collateral or its proceeds continues after an unauthorized transfer of the collateral, but may be

terminated by satisfaction of the debt or consensual transfer by the debtor. ORS § 79.3060; see *Bank of Lexington v. Jack Adams Aircraft Sales, Inc.*, 570 F.2d 1220 (5th Cir.1978); see also *In re Hodge Forest Indus.*, 59 B.R. 801, 803-804 (Bankr.D.Idaho 1986).

Government Contract Claim

**2 The parties concede that CCI had a perfected security interest in the Government Contract Claim as of November 18, 1993. The Trustee cites two major errors by the bankruptcy court that warrant reversal. The Trustee first argues that the MFC Transaction terminated CCI's interest in the Government Contract Claim, to the extent that such interest was granted by the Debtor, because both the collateral and the debt that it secured were transferred to MFC. Once the Debtor no longer had rights in the collateral and no longer owed CCI a debt, the Trustee argues, CCI's perfected security interest was terminated. Further, the Trustee argues that the Rescission Agreement did not revive CCI's interest in the Government Contract Claim, even though ownership of the collateral returned to the Debtor. We agree.

The bankruptcy court erred by finding that the security interest and financing statement that were applicable in November 1993 were unaffected by the MFC Transaction. The bankruptcy court specifically found that "WSI continued to be a debtor [after the MFC Transaction] so long as its assets were pledged as collateral for the CCI obligation." *Id.* However, the documents make clear that both the debt and the collateral were transferred to MFC as part of the MFC Transaction. The MFC Security Agreement states that MFC's assets, acquired from WSI, were pledged as the security for the new Consolidated Indebtedness. WSI was not a party to the MFC Security Agreement and there is no mention in any of the documents that any security interest in WSI's assets was required or created with respect to the new Consolidated Indebtedness. As a result, WSI could not continue to be a "debtor" under Oregon law, OR 79.1050(1)(d), and no "security interest" could exist between CCI and WSI in the absence of a debt, ORS § 71.2010(37)(a). [FN2]

FN2. A "debtor" is "the person who owes payment or other performance of the obligation secured, whether or not the person owns or has rights in the

collateral.... Where the debtor and the owner of the collateral are not the same person, the term 'debtor' means the owner of the collateral...." ORS § 79.1050(1)(d). A "security interest" is "an interest in personal property ... which secures payment or performance of an obligation." ORS § 71.2010(37)(a).

Furthermore, the bankruptcy court erred by relying on the fact that a valid financing statement naming WSI as a debtor was still in force after the MFC Transaction. The existence of a financing statement naming WSI as a debtor does not change the fact that WSI was no longer indebted to CCI, and was no longer the owner of the collateral pledged on a new and different debt.

The bankruptcy court also erred when it found that, because the transfer of the collateral contemplated by the MFC Transaction was void ab initio, CCI was continuously perfected in the Government Contract Claim. Because the transfer was done with CCI's unconditional consent, CCI's security interest in the collateral was terminated at that time. ORS § 79.3060(2). The documents upon which CCI relies to argue that a security interest was recaptured after the Rescission Agreement was implemented could neither create nor maintain a security interest in favor of CCI once the underlying debts were restructured by the MFC Transaction.

ARCO Alaska Claim

The Debtor assigned its interest in the ARCO Alaska Claim to CCI in exchange for an extension of the repayment period on the Denali loan.

**3 The bankruptcy court correctly found that CCI's security interest in the ARCO Alaska Claim attached at the time of the Denali Loan modification and was perfected by Financing Statement 1 that acknowledged CCI's interest in all the Debtor's "accounts, accounts receivable, contract rights ... and all rights to payment ... for services rendered...." See ORS § 79.3030(1)(providing that a security interest is perfected at the time of attachment when a financing statement is filed prior to the perfection); ORS § 79.4020 ("A financing statement may be filed before a security agreement is made or a security interest otherwise attaches.").

The bankruptcy court observed that the Debtor

subsequently transferred the ARCO Alaska Claim to MFC and that no new documentation of this transaction was filed. The Trustee argues that MFC's failure to perfect its interest in the Claim deprives CCI of its security interest. The Trustee is mistaken.

It is not clear from the record whether CCI consented to the transfer of the ARCO Alaska Claim to MFC. However, CCI's interest remains perfected in either case because it had a validly perfected security interest in MFC's accounts. If the transfer was unauthorized, CCI's interest follows the collateral pursuant to ORS § 79.3060(2) ("[A] security interest continues in collateral notwithstanding sale, exchange or other disposition thereof...."); If it was authorized, CCI's interest in MFC's accounts would establish CCI's interest in the Claim. ORS 79.4020(7) ("A filed financing statement remains effective with respect to collateral transferred by the debtor even though the secured party knows of or consents to the transfer.")

For the reasons set forth above, we reverse the judgment of the bankruptcy court with respect to the Government Contract Claim and affirm the bankruptcy court judgment with respect to the ARCO Alaska Claim.

AFFIRMED IN PART and REVERSED IN PART, no party to recover costs on this appeal.

LEAVY, J., concurring in part and dissenting in part.

LEAVY, J.

I concur in the portion of the disposition which affirms the district court's judgment with respect to the ARCO Alaska Claim.

I respectfully dissent from the portion of the disposition regarding the Government Claims. I agree with CCI's position that WSI was at all times a "debtor" as defined by Oregon law. Both the Bankruptcy Court and the district court concluded the WSI was a "debtor" so long as its assets were pledged as collateral. Because of the specific terms of the Rescission Agreement, WSI never lost its rights in the Government Claims, and therefore was at all times a "debtor." Or.Rev.Stat. § 79.1050(1)(d).

Furthermore, I reject the Trustee's assertion that the MFC Transaction terminated CCI's security interest in the Government Claims. WSI granted CCI a security interest in the Government Claims by executing the documents referred to as the Collateral Assignments. The Collateral Assignments were specifically ratified in the MFC Transaction. The Trustee argues that when both the payment obligation and the collateral were transferred to MFC, the MFC Transaction "necessarily removed the language in which WSI granted CCI a security interest and replaced it with new language in which MFC granted CCI a security interest." This argument is unsupported.

****4** An enforceable "security interest" attaches if there is (1) a signed "security agreement"; (2) value given; and (3) the debtor has rights in the collateral. Or.Rev.Stat. § 79.2030(1). A "security agreement" is defined as "an agreement which creates or provides for a security interest." Or.Rev.Stat. § 79.1050(L). The general presumption of validity of a "security agreement" is set forth in Or.Rev.Stat. § 79.2010 which provides that "a security agreement is effective according to its terms between the parties, against purchasers of the collateral and against creditors."

In this case, CCI had an enforceable security interest in the Government Claims because (1) WSI signed written security agreements (the Collateral Assignments); (2) CCI gave value in the form of loans; and (3) WSI had rights in the Government Claims at all times by virtue of the Rescission Agreement. When CCI consented to the transfer of the Government Claims to MFC, CCI had an enforceable security interest in this collateral pursuant to the MFC Security Agreement. However, the written security agreements with WSI (the Collateral Assignments) were still in existence and were not terminated by satisfaction of the debt or by operation of law. When the transfer of the Government Claims was rescinded and treated as void ab initio, CCI still satisfied the statutory requirements for an enforceable security interest. Or.Rev.Stat. § 79.2030(2). The majority cites no authority to the contrary. I would affirm the judgment of the district court.

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