11 USC §547
Assignment- security v. absolute
ORS 79.3040

Bank of Eastern Oregon v. Bettis Adv. No. 87-0435-H
In re Brooks Case No. 386-06720-H7

BAP No. 89-1682-RMeO

10/9/90 BAP Affirm unpublished

The BAP affirmed J. Hess's ruling that the Bank held a promissory note in escrow as a fiduciary and not as a creditor and that the assignment of the note was not absolute but was for security. Since the Bank had not perfected by filing and was not perfected by possession since it held the note only as a fiduciary, the assignment was avoidable under Section 547(b) and the Bank must turn over proceeds received during the 90 days preceding bankruptcy.

NOT FOR PUBLICATION

UNITED STATES BANKRUPTCY APPELLATE PANEL

OF THE NINTH CIRCUIT

In re	BAP No. OR 89-1682 RMeO
GREGORY D. and ORLA M. BROOKS,	BK. No. 386-06720-H7
Debtors.	ADV. NO. 87-0435-H
BANK OF EASTERN OREGON,	
Appellant,	
v.	MEMORANDUM
WADE P. BETTIS, JR. Bankruptcy Trustee,	
Appellee.	

Argued and Submitted on
September 13, 1990 at Portland, Oregon

Filed - OCT 09 1990

Appeal from the United States Bankruptcy Court
for the District of Oregon

Honorable Henry L. Hess, Jr., Chief Bankruptcy Judge, Presiding

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Before: RUSSELL, MEYERS, and OLLASON, Bankruptcy Judges.

P 90-34(8)

(42)

I. FACTS

In 1983 the debtors, Gregory D. Brooks and Orla M. Brooks (the Brooks) sold certain real property to Nicholas J. and Diane D. Welp (the Welps) for $285,000 cash and a $115,000 promissory note payable to the Brooks that was secured by a mortgage on the property (Welp mortgage). The promissory note was deposited into an escrow account at the Bank of Eastern Oregon (BEO), the appellant. Under the escrow agreement BEO, as escrow agent, was authorized to disburse funds received from the Welps to BEO to be applied towards the Brooks' pre-existing loan with BEO.

On November 7, 1983, Gregory D. Brooks executed an assignment all of his interest in the escrow. The assignment document does not state to whom the assignment was made. On October 27, 1986, the Brooks executed an assignment to BEO of their interests in the Welp mortgage. Approximately $88,627.46 remained owing on the land sale contract at the time of the assignment.

The Brooks filed a Chapter 7 petition on December 15, 1986. The Chapter 7 trustee/appellee filed an adversary proceeding seeking to avoid the transfer of this interest pursuant to 11 U.S.C. § 547(b).[1] The bankruptcy court found that BEO held the note as a fiduciary, not as a creditor and had failed to perfect its security interest, therefore, BEO's interest may be set aside and preserved for the estate pursuant to §§ 544 and 551. The court ordered that the proceeds received on the Welp note by BEO

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[1] All code sections refer to Title 11 of the United States Code unless otherwise indicated.

commencing with 90 days prior to the filing of the Brooks' petition, $127,618.88, be turned over to the Chapter 7 trustee. BEO timely filed a notice of appeal from this order.

II. ISSUES

1. Whether the assignment of the interest in the Welps/Brooks escrow by the Brooks to the Bank of Eastern Oregon was absolute or an assignment for security for the debt the Brooks owed to the bank.

2. Whether possession of the Welps/Brooks promissory note perfected the banks security interest.

III. STANDARD OF REVIEW

Findings of fact are reviewed under the clearly erroneous standard and conclusions of law are reviewed de novo. Ragsdale v. Haller, 780 F.2d 794 (9th Cir. 1986); Bankr. R. 8013. A finding of fact is clearly erroneous if the Panel, after reviewing the evidence, is "left with the definite and firm conviction that a mistake has been committed." Anderson v. City of Bessemer City, 470 U.S. 564, 573, 105 S. Ct. 1504, 1511, 84 L.Ed.2d 518 (1985) (quoting United States v. United States Gypsum Co., 333 U.S. 364, 395, 68 S. Ct. 525, 541-42, 92 L.Ed.2d 746 (1948)). Interpretations of state law are reviewed de novo. Churchill v. Fjord (Matter of McLinn), 739 F.2d 1395, 1397 (9th Cir. 1984) (en banc).

IV. DISCUSSION

The bankruptcy court based its decision on the underlying documents and the conduct of BEO. First, the court found that the assignment was revocable because the escrow instructions could be changed at any time upon the consent of the Brooks and the Welps. Second, if the bank had intended an absolute assignment, it would

have credited the Brooks' account with $115,000, the amount of the note and cancel the note given by the Brooks to BEO. No such credit was made and in fact, BEO stated that it would look to the Brooks for payment if the Welps defaulted on the payments into the escrow account. Since BEO held the note as a fiduciary rather than as a creditor, the court reasoned, BEO could not assert that its possession was for the purpose of perfecting its security interest.

The appellant, BEO, argues that the assignment was absolute and irrevocable based on the intent of the parties and that its possession of the note perfected its security interest. BEO admits that "the October 27, 1986 assignment adds a mortgage conveyance and is ineffective against the Trustee. But paragraph C of the recitals shows that the parties previously intended a complete assignment of the payments to the Bank", referring to the 1983 assignment of the Brooks interest in the escrow account.

A. Whether the bank held the Welps/Brooks Promissory Note as an Escrow Agent or had Proprietary Possession.

Under Oregon law, a present and binding appropriation of an interest in a specific fund is an assignment. Wakefield, Fries & Co. v. Parkhurst, 84 Or. 483, 486, 165 P. 578 (1917). BEO argues that the assignment of the Brooks interest in the escrow account was absolute as of November 7, 1983 and that the November 27, 1986 assignment of the Brooks interest in the mortgage was to memorialize and clarify the intent of the parties to the previous assignment. The 1986 assignment of the mortgage payments to BEO recites that it was made "to be applied to an outstanding debt of the assignors to the bank totaling $115,000.00 as of October 31,

1983 . . ." The 1983 assignment, which does not identify the assignee, recites that in consideration of a commercial note in the sum of $115,000 the Brooks assign their interest in the escrow between the Brooks and the Welps.

Additionally, the November 7, 1983 summary of the Brooks' account with BEO shows a "$115,000.00 loan secured to Escrow with N. Welp." As noted by the bankruptcy court, nowhere in BEO's records is there a credit of the $115,000 to the Brooks account to support BEO's position that it took an absolute assignment of the interest in the $115,000 debt.

The 1983 escrow agreement itself lists the parties as the Brooks and the Welps. The Welps agreed to pay to the order of the Brooks, not BEO, the balance of the purchase price. BEO's role in the escrow was as a disbursing agent:

> You are authorized to disburse the funds received as follows:
>
> To the Bank of Eastern Oregon to apply towards Sellers' loan with said Bank.
>
> These escrow instructions shall be irrevocable, including the disbursement provisions set forth above and may not be altered, modified or changed in any way without the written consent of the Sellers and Buyers first being obtained.

In other words, the parties to the escrow agreement could change the escrow instructions without the consent of BEO, which is also inconsistent with an absolute assignment.

BEO admits that if the Welps defaulted on payments into the escrow account, they would look to the Brooks for payment. This position is inconsistent with BEO's claim of absolute assignment:

It is true that, in the case of a total assignment "as

> security," the grantor or assignor still has an "interest" to be protected; but analysis shows that it is secondary and inferior to that of the assignee. It no longer includes any presently enforceable right to the performance promised by the obligor. It is the assignee alone who has that enforceable right; and it is now the assignee to whom the obligor is legally bound to pay every dollar included in the assignment.

4 Corbin on Contracts § 891 (Supp., 1990). If the Brooks had absolutely assigned all of their interests in the payments on the Welps mortgage, then BEO would have to pursue the Welps in the event of their default. The effect of an absolute assignment of the interests in the mortgage payments would have extinguished any rights the Brooks had to payment from the Welps and the Brooks would not be a necessary party to an action to enforce the mortgage payments. See e.g., Morton v. Thornton, 259 N.C. 697, 131 S.E.2d 378 (1963); National Motor Service Co v. Walters, 85 Idaho 349, 379 P.2d 643 (1963); Westville Land Co. v. Handle, 112 N.J.L. 447, 171 A. 520 (1934); Lincoln Nat. Life Ins. Co. v. Scales, 62 F.2d 582 (5th Cir. 1933).

BEO claims that the bankruptcy court erred in failing to distinguish between absolute assignment and assignment for security. However, BEO fails to define these terms or show specifically what differentiates these besides the intent of the parties. BEO repeatedly makes the argument that the court erred in failing to consider the testimony of the parties as to their intent in these transactions ignoring the apparent conclusion of the court that the conduct of the bank and the underlying documents were more indicative of the true intent of the parties. The bankruptcy court did not fail to ascertain the intent of the

parties, it merely disagreed with the intent with which BEO characterizes these transactions.

Based on our review of the record, we cannot conclude that the bankruptcy court's findings of fact were clearly erroneous, therefore, we affirm its finding that the assignment was only for the purpose of providing security for the debt owed by the debtor to the bank.

B. The Bank's Possession of the Welps Promissory Note Did Not Perfect it's Security Interest.

BEO claims that it perfected its security interest in the Welps note by possession pursuant to ORS 79.3040 which provides:

> (1) A security interest in chattel paper or negotiable documents may be perfected by filing. A security interest in money or instruments (other than certificated securities or instruments which constitute part of chattel paper) can be perfected only by the secured party's taking possession, except as provided in subsections (4) and (5) of this section and ORS 79.3060(2) and (3) on proceeds.

In Security Bank v. Chiapuzio, 304 Or. 438, 747 P.2d 335 (Or. 1987) (en banc), the Oregon Supreme Court held that assignment for security of a vendor's interest in a land sale contract is subject to the filing requirements of Article 9 of the UCC and therefore required to be recorded under ORS 79.1010 to 79.5070. In that case, the bank had acquired the vendor's interest in a land sale contract and the property itself as collateral for a loan to the vendor. The Chiapuzio court differentiated between an interest in the land and an interest in the land sale contract. The bank did not file notice of its security interest as required by Article 9 and the court subordinated the bank's security interest.

The bankruptcy court found that BEO's possession of the

Welps/Brooks note did not perfect its security interest because it held the note only as the escrow agent. ORS 79.3050 provides:

> When possession by secured party perfects security interest without filing.
> A security interest in letters of credit and advices of credit as provided in ORS 75.1160(2)(a), goods, instruments (other than certified securities), money, negotiable documents or chattel paper may be perfected by the secured party's taking possession of the collateral.

We agree with the bankruptcy court's conclusion that BEO's possession alone did not perfect it's interest in the Welps/Brooks note. The bank's possession of the note as the escrow agent does not place it in the same position as that of creditor in possession. Had the Welps and Brooks used an escrow agent outside of the bank, BEO would still have to meet the Article 9 requirements for perfection. The fact that the parties did use BEO as the escrow agent does not relieve BEO from having to meet these requirements.

We affirm the finding of the bankruptcy court that BEO failed to perfect its security because it held the note as a fiduciary, not as a creditor.

V. CONCLUSION

The assignment to BEO of the Brooks interest in the payments from the Welps was an assignment made for the purpose of securing the debt that the Brooks owed to BEO. BEO, as the escrow agent, held the Welps/Brooks note as a fiduciary, therefore, BEO's possession did not perfect it's security interest under Article 9 of the UCC as required under Oregon law.

AFFIRMED.