

**UNITED STATES BANKRUPTCY COURT
MIDDLE DISTRICT OF FLORIDA
JACKSONVILLE DIVISION**

IN RE:

CASE NO.: 09-5923-3F2

**WILLIAM C. BLANTON, JR.
And BRENDA F. BLANTON,**

Debtors.

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FINDINGS OF FACT AND CONCLUSIONS OF LAW

This case came before the Court upon Motion to Use Cash Collateral filed by Debtors and Motion for Payment of Funds under Assignment and to Prohibit Debtors' Use of Cash Collateral without Adequate Protection and Response in Opposition to Debtors' Motion for Use of Cash Collateral filed by First Financial Bank ("First Financial"). The Court conducted an evidentiary hearing on the matter on August 26, 2009. In lieu of oral argument the Court directed the parties to submit memoranda in support of their respective positions. Upon the evidence and the arguments of the parties, the Court makes the following Findings of Fact and Conclusions of Law.

Findings of Fact

On July 19, 2009 (the "Petition Date") Debtors filed a Chapter 12 bankruptcy petition. Debtors own and operate a poultry farm and related real and personal property located in Suwannee County, Florida. The income from Debtors' poultry farm is their sole source of income.

On May 17, 2006 Debtors borrowed \$1,244,000.00 from First Financial, which is evidenced by a promissory note. The promissory note indicates that "[t]his Loan is secured by separate security interests prepared together with this Note as follows....ASSIGNMENT OF POULTRY PROCEEDS." To secure the loan Debtors executed a mortgage, which grants First Financial a first priority lien in, among other things, the real estate described therein. Debtors also executed a security agreement which gave First Financial a security interest in "[a]ll Debtors now owned or

hereafter acquired poultry equipment, accounts, deposit accounts, general intangibles, payment intangibles and assignment of proceeds pursuant to the security agreement with First Financial Bank.” On that same day Debtors executed an assignment (the “Assignment”) by which they assigned to First Financial a portion of their interest in the proceeds under broiler production agreements entered into with Gold Kist, Inc., an entity which was subsequently acquired by Pilgrim’s Pride. The assignment states that it is made to “secure the prompt payment of indebtedness evidenced by [the promissory note.]” Jody Murphey, vice president of First Financial, testified that the assignment was “an absolute assignment. It gives us a right to that—to the—to that property, to that payment....the intent of the Mortgage and the Security Agreement is to allow us to secure the payments, the obligations, under that note, to secure the obligations under that note. The intent of the assignment is to secure the partial payments.” Mr. Murphey admitted that if Debtors’ loan was paid off, First Financial would not continue to insist on receiving the assignment payments.

On July 24, 2006 First Financial filed a UCC-1 Financing Statement with the Secretary of State of Florida which provided that it had a security interest in, among other things, an assignment of proceeds pursuant to [Debtors’] security agreement with First Financial.

Broiler production agreements with Gold Kist, Inc. were granted to poultry growers such as Debtors on a flock-to-flock basis and were subject to performance and other criteria utilized in Gold Kist’s business judgment. Under the terms of the broiler production agreements, the actual ownership of the chickens placed in Debtors’ broiler houses and other growers remained with Gold Kist, Inc. As the Court noted, at some point Pilgrim’s Pride acquired Gold Kist, Inc. Thereafter, Pilgrim’s Pride entered into a series of broiler production agreements with Debtors on a flock-to-flock basis. On July 11, 2009, prior to the Petition Date, Debtors entered into a new Broiler

Production Agreement with Pilgrim's Pride. On July 21, 2009 Pilgrim's Pride delivered to Debtors the flocks which were the subject of the July 11, 2009 Broiler Production Agreement.

Conclusions of Law

Initially, First Financial argues that Debtors assigned a portion of the Pilgrim's Pride payments under the Broiler Production Agreement to First Financial. Debtors argue that the pre-petition assignment is not an absolute assignment but a collateral assignment given to secure payment of the indebtedness owed to First Financial.

Whether an assignment is intended to be an absolute assignment or to serve as a security transaction is a question of fact to be determined by the intent of the parties. In re Radice Corp., 88 B.R. 422 (S.D. Fla. Bankr. 1988). The court in Evergreen Valley Resort, Inc., 23 B.R. 659 (Bankr. D. Maine 1982) set forth a number of factors which the Court finds helpful in determining whether a transaction is intended to create a security interest or an absolute assignment. In that case the debtor executed a pre-petition assignment to a creditor of excess proceeds resulting from the sale of time share units. The debtor asserted that the proceeds were cash collateral, which it could use as the debtor-in-possession. The creditor argued that the assignment was absolute and the proceeds were not property of the estate. Initially the court noted that the Uniform Commercial Code offers little guidance in determining whether an assignment is absolute or is a security transaction. The court set forth the following factors, which indicate that an assignment operates to create a security interest only: 1) the assignee retains a right to a deficiency on the debt if the assignment does not provide sufficient funds to satisfy the debt; 2) the assignee acknowledges that its rights in the assigned property would be extinguished if the debt owed was paid from some other source; 3) the assignee must account to the assignor for any surplus received from the assignment over the amount of the debt; and 4) evidence shows that the assignor's debt is not reduced on account of the

assignment. An application of the Evergreen factors to the instant case leads to the conclusion that the Assignment was intended to serve as a security transaction. The mortgage, promissory note and related loan documentation permit First Financial to seek in personam relief, and to obtain a final judgment and writ of garnishment against Debtors in the event of a default. The loan documentation provides, and Mr. Murphey's testimony corroborates, that if Debtors were to pay in full the indebtedness owed to First Financial, First Financial's assignment would be released. The loan documentation does not provide that the Assignment discharges the underlying debt. The assignment itself states that it is made to "secure the prompt payment of indebtedness evidence by [the promissory note.]" The promissory note indicates that "[t]his Loan is secured by separate security interests prepared together with this Note as follows....ASSIGNMENT OF POULTRY PROCEEDS." The security agreement indicates that it is given to secure payment of the secured debt and the property being pledged includes an assignment of proceeds. Finally, the UCC-1 Financing Statement refers to the assignment of proceeds pursuant to the security agreement with First Financial. The Court finds that the Assignment was not an absolute assignment but was instead a collateral assignment given to secure payment of the indebtedness owed to First Financial.

Next, First Financial argues that the assigned funds are its cash collateral. First Financial seeks to have the Court prohibit Debtors' use of First Financial's cash collateral and to turn it over to First Financial. Alternatively, First Financial seeks adequate protection. First Financial argues that Debtors' contractual right to payment under the July 11, 2009 Broiler Production Agreement is a pre-petition account under the Arkansas U.C.C., which account and the proceeds thereof Debtors pledged as collateral securing the loan from First Financial. Accordingly, First Financial argues that

payments for post-petition services performed under the pre-petition Broiler Production Agreement constitute its cash collateral.¹

Section 552(a) of the Bankruptcy Code sets forth the general rule that a pre-petition security interest does not extend to property acquired after the commencement of a bankruptcy proceeding. Section 552(b)(1) creates an exception for the proceeds of pre-petition collateral and provides in pertinent part:

if the debtor and an entity entered into a security agreement before the commencement of the case and if the security interest created by such security agreement extends to property of the debtor acquired before the commencement of the case and to proceeds, products, offspring, or profits of such property, then such security interest extends to such proceeds, products, offspring, or profits acquired by the estate after the commencement of the case to the extent provided by such security agreement and by applicable nonbankruptcy law.

In In re Patio & Porch Systems, Inc., 194 B.R. 569 (Bankr. D. Md. 1996) the Court considered a similar issue to that presented in the instant case. The issue before the Court was whether a creditor's pre-petition security interest in accounts encumbered rights to payment under pre-petition contracts that were performed post-petition and if so, whether post-petition payments for those contracts were proceeds of the encumbered accounts so as to meet the exception of § 552(b). The court answered both questions in the affirmative. Noting the definition of account as "any right to payment for goods sold or leased or for services rendered which is not evidenced by an instrument or chattel paper, whether or not it has been earned by performance", the court reasoned

¹ The Court notes that Debtors' post-trial submission did not address First Financial's argument that it holds a security interest in Debtors' accounts. Despite having introduced a copy of the security agreement and the UCC-1 into evidence, Debtors assert in their memorandum that "[First Financial] has failed to provide this Court with a security agreement in which [Debtors] granted [First Financial] a lien in any specified collateral or proceeds. Therefore [First Financial] has failed to meet the threshold of a pre-petition security interest. Even if [First Financial] holds a security agreement executed by [Debtors], the terms of the UCC-1 Financing Statement only provide [it] with a perfected security interest in poultry, eggs and poultry products and proceeds of poultry, eggs and poultry product[s] 'owned or hereafter owned by the debtor.'"

that if the contracts giving rise to the right of payment were in existence pre-petition, then the creditor's security interest in accounts extended to the right to payment under those contracts for services performed post-petition. The court stated that "[t]he fact that Debtor may not have begun performance on the contracts until after filing for bankruptcy is immaterial in determining the extent of Creditor's security interest. The only fact significant is that the contracts were entered into prepetition." The court held that the payments made under the contracts were proceeds of the accounts receivable (in which the creditor had a security interest) under § 552(b). Consequently the creditor's security interest in the accounts receivable continued post-petition as to the contract payments. The Court agrees with the reasoning set forth in Patio & Porch Systems as to the July 11, 2009 Broiler Production Agreement.² Any post-petition payments made under the Broiler Production Agreement³ are proceeds of the encumbered account under § 552(b).

Under § 552(b)(1) an entity with a valid security interest in proceeds in property is entitled to have that interest enforced "except to any extent that the court, after notice and a hearing and based on the equities of the case, orders otherwise." The Court finds it inappropriate to invalidate First Financial's security interest in the instant case. First Financial is entitled to adequate protection for the use of its cash collateral.

There appears to be a continuing dispute as to the Debtors' budget projections. Subsequent to the hearing upon which this order is based, First Financial filed a Motion to Reopen the evidence in which it alleges that Debtors have provided it with at least five sets of figures as to their income and operating expenses. The Court urges the parties to reach an agreement as to adequate

² First Financial asserts that the Court must apply Arkansas law in the instant case. Whether the Court applies the Arkansas or the Florida version of the U.C.C., the result is the same. The definitions of "account" and "proceeds" set forth in the Arkansas and Florida versions of the U.C.C. are identical and are similar, if not more expansive, than the provisions set forth in Patio & Porch Systems.

³ Debtors presented into evidence a broiler production agreement dated July 11, 2009. First Financial disputes the applicability of that agreement on the basis that it was signed only by Debtor William Blanton and not by Pilgrim's

protection. In an abundance of caution, however, the Court will schedule a hearing on December 7, 2009 at 10:00 a.m. to make such a determination to the extent that the issue has not been otherwise resolved. In the interim, the Court finds it appropriate to grant adequate protection to First Financial in the amount of \$5,210.82 from each flock of birds until further order of the Court. The Court will enter a separate order consistent with these Findings of Fact and Conclusions of Law.

DATED this 20 day of October, 2009 in Jacksonville, Florida.

/s/

JERRY A. FUNK
United States Bankruptcy Judge

Copies Furnished To:

Michael Demont, Attorney for First Financial Bank
Andrew J. Decker, III, Attorney for Debtors
Douglas Neway, Chapter 12 Trustee

Pride. Whether an earlier broiler production agreement or the July 11, 2009 Broiler Production Agreement is the

operable contract is immaterial as both agreements existed prior to the Petition Date.