

#2523

signed 5-17-00

**IN THE UNITED STATES BANKRUPTCY COURT  
FOR THE DISTRICT OF KANSAS**

**In Re:**

**G & G TRUCKING COMPANY, INC.,  
  
DEBTOR.**

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**CASE NO. 97-42012-7  
CHAPTER 7**

**NEWCOURT FINANCIAL USA, INC.,  
  
PLAINTIFF,**

**v.**

**ADV. NO. 97-7119**

**G & G TRUCKING COMPANY, INC.,  
DOONAN TRUCK AND EQUIP. OF  
WICHITA, INC.,  
STATE BANK OF DELPHOS,  
DAVID R. KLAASSEN, and,  
DARCY D. WILLIAMSON, Trustee,  
  
DEFENDANTS.**

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**ORDER DENYING TRUSTEE'S MOTION TO ALTER OR AMEND**

This proceeding is before the Court on the defendant-trustee's motion to alter or amend its rulings on various issues. Defendant-trustee Darcy D. Williamson appears *pro se*. There are no other appearances. The Court recently learned that this motion was filed on March 3, 1999, and has not yet been ruled on. The Court has now reviewed the relevant materials and is ready to rule.

The trustee points out that the Court filed a Memorandum of Decision on February 22, 1999, and also at an earlier hearing, had made an oral ruling that was not yet reduced to writing. With respect to interested party Associates Commercial Corporation ("Associates") and defendant State Bank of

Delphos (“State Bank”), she then asks the Court to “reconsider, alter and amend its rulings for the reasons set forth below.” The trustee proceeds to argue that these creditors’ liens on certain tractor-trailer units owned by the debtor did not attach because two of the requirements set out in K.S.A. 84-9-203(1)(a) for attachment have not been met. As relevant here, that statute provides that a security interest is not enforceable against the debtor or third parties with respect to collateral and does not attach unless: (1) the debtor has signed a security agreement that contains a description of the collateral; (2) value has been given; and (3) the debtor has rights in the collateral. The trustee argues that the first and third of these requirements have not been met for Associates’ and the State Bank’s liens on the property.

The trustee’s argument that the debtor did not sign these creditors’ security agreements relies on her assertion that the pre-incorporation signatures supplied by the debtor’s incorporator purportedly as its president did not comply with the requirements of the debtor’s bylaws for signing documents on behalf of the corporation and obtaining the approval of its board of directors to contract for a loan or other debt. However, the Court is convinced that the presumption of the corporate principal’s ratification of its incorporator-agent’s actions that arose because the corporation did not promptly repudiate his pre-incorporation actions after learning of them (which, in this case, it did as soon as it was formed) is an exception that overrides the corporate formalities that may be required in other circumstances. The debtor ratified the pre-incorporation signatures by failing to inform the creditors shortly after the corporation came into existence that the signatures were unauthorized.

The trustee’s argument about the debtor’s rights in the collateral seems to be based on several different assertions. Associates’ security agreements all described the specific vehicles in dispute in this

proceeding. The trustee first claims Associates' liens on a number of the vehicles never attached because "the nonexistent debtor accepted title" to them, apparently suggesting the titles would thereafter have remained in limbo forever and the debtor would never have had rights in those vehicles. The Court finds this claim to be singularly unconvincing. While there might be some question who had rights in the vehicles before the debtor came into existence, the Court believes the question ended once the debtor was properly formed. The trustee next suggests Associates' liens on two other vehicles did not attach because they were sold to the debtor a couple of months after the debtor granted security interests in them, apparently suggesting a debtor must have rights in collateral before it can validly grant a security interest in it. The Court rejects this assertion for several reasons. First, under the circumstances of this case, the Court is not certain the debtor necessarily had no rights in these vehicles until the parties who were dividing their joint business actually executed the documents necessary to transfer the titles to the debtor. Instead, it seems likely the parties had agreed sometime earlier to make the transfers, and that agreement probably gave the debtor rights in the vehicles. Second, while the Court would agree it is probably more usual for a debtor to grant a security interest only in property in which it already has rights, the UCC does not make this a requirement for attachment. As the Kansas Comment, 1996, to subsection (2) of K.S.A. 84-9-203 states: "Attachment occurs on the completion of the last of the three events. The events do not need to occur in any particular order." Consequently, even if the debtor had absolutely no rights in these two vehicles before the title transfer was made, attachment occurred then because the debtor had already signed a security agreement covering them and, as the Court assumes since the trustee has not claimed otherwise, Associates had given the debtor value.

The trustee rather vaguely suggests these reasons also prevented the State Bank's lien from attaching to these vehicles. For the vehicles transferred to the debtor before it was properly formed, the Court rejects the argument for the same reasons applicable to Associates. For the vehicles transferred later, a somewhat different analysis applies. The State Bank's lien on the vehicles arises from a security agreement covering various types of collateral. The categories listed included property "that I [the debtor] now own or that I may own in the future." Such after-acquired property clauses are specifically authorized by K.S.A. 84-9-204(1). The trustee also asserts that the State Bank had no security agreement that granted it a security interest in the vehicles in dispute here. While it is true that the State Bank's security agreement did not identify any specific vehicle by make, model, year, or vehicle identification number, the Bank's security agreement did, as indicated above, cover equipment, including vehicles. The debtor was a trucking company, so the tractor-trailer units it owned were equipment it used in its business. This security agreement was sufficient to give the State Bank a lien on the debtor's vehicles, and the Bank perfected its lien by getting it noted on the vehicles' titles. Consequently, the State Bank's lien extended to the two vehicles that the debtor may have obtained rights in only sometime after the debtor had given the security interest.

The trustee asks the Court to reconsider her argument that the debtor could not have ratified its incorporator's pre-incorporation actions because it was not aware it needed to do so. However, as indicated in the Memorandum of Decision, the Court believes that Kansas law provides for automatic ratification of such actions unless the debtor "promptly repudiates" them after becoming aware of them. After learning of unauthorized pre-incorporation actions by its incorporator, a corporation may not remain silent and later claim it is not bound by those actions. Instead, it has the burden to inform the

parties with whom the incorporator dealt that the actions were not authorized and that the corporation will not be bound by them. Otherwise, ratification will be deemed to have occurred and the corporation cannot escape the consequences of the actions by claiming it was ignorant of this facet of the law. Despite the trustee's view that a corporation must take affirmative steps to ratify the incorporator's actions, the Court is convinced that in circumstances like those presented by this case, ratification occurs through the corporation's inaction.

Finally, the trustee adopts by reference the briefs she previously filed in this proceeding and asks the Court generally to reconsider its rulings. Although this is a questionable way to support a motion to alter or amend, the Court has nevertheless perused the briefs again and remains unconvinced by the trustee's arguments.

For these reasons, the trustee's motion to alter or amend is denied.

IT IS SO ORDERED.

Dated at Topeka, Kansas, this \_\_\_\_\_ day of May, 2000.

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JAMES A. PUSATERI  
CHIEF BANKRUPTCY JUDGE