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

**In re:**

**KELLENE LLOYDETTTE WOOD,**

**DEBTOR.**

**CASE NO. 99-42831-13**

**CHAPTER 13**

**ORDER DETERMINING THAT STATE BANK OF MERIDEN HAS A VALID AND ENFORCEABLE SECURITY INTEREST IN DEBTOR'S MOBILE HOME AND SUSTAINING PART OF ITS OBJECTION TO DEBTOR'S CHAPTER 13 PLAN**

This matter is before the Court for resolution of an objection to the debtor's chapter 13 plan. The debtor appears by counsel Fred W. Schwinn. The creditor, the State Bank of Meriden ("State Bank"), appears by counsel David S. Fricke. The Court has reviewed the relevant materials and is now ready to rule.

Although the State Bank raised a variety of issues in its objection, at the Court's request, the parties briefed only two of those issues. The Court recently resolved one of the issues—whether debtors can require secured creditors to release their liens after the value of their collateral has been paid to them through the plan but before the debtors receive their discharges—in another case with a ruling that will apply to this and all the Court's chapter 13 cases. *See In re McGinley*, Case No. 00-40223-13, Order Sustaining Objection to Plan Provision Requiring Secured Creditor to Release Lien Before Completion of Chapter 13 Plan (Bankr.D.Kan. July 19, 2000) (Pusateri, C.J.). This order will address only the second issue, whether the State Bank has a valid and enforceable security interest in the debtor's mobile home.

FACTS

In connection with a loan obtained from the State Bank, the debtor and her then-husband signed three documents dated September 15, 1998: a promissory note, a document labeled “Preliminary Disclosure Statement,” and a document containing Truth-in-Lending disclosures. The documents are largely pre-printed forms with various information added in spaces provided. Each identifies the debtor and her ex-husband as the “Borrower” and the State Bank as the “Lender.” They all have the same loan number—35784—written by hand in an appropriately labeled spot. All indicate the loan was for \$17,502.50, called “Principal” on the note and “Amount Financed” on the other documents.

The note contains the statement: “COLLATERAL. This Note is secured by 1992 SCHULTZ 16x80 MOBILE HOME ID# 8016429.” The Preliminary Disclosure Statement contains this sentence: “I am giving a security interest in the goods or property being purchased. . . .” The Truth-in-Lending disclosures document has a box checked beside the statement: “Security: I am giving a security interest in.” Immediately below that, another box is checked beside the statement: “the goods or property being purchased.” On the same line, but somewhat to the right of that statement, the words “Mobile Home” have been typed onto the form.

#### DISCUSSION AND CONCLUSIONS

The debtor contends the promissory note she signed did not create a valid and enforceable security interest because it does not include language that can be construed to “grant” a security interest, relying on *Transport Equipment Co. v. Guaranty State Bank*, 518 F.2d 377, 380 (10th Cir. 1975), to support this claim. She adds that the Preliminary Disclosure Statement and Truth-in-Lending

document cannot supply the needed language because neither they nor the note refer to or incorporate one another. The Court cannot agree with either argument.

The Kansas version of the Uniform Commercial Code establishes the requirements the State Bank had to satisfy to obtain a valid and enforceable security interest in the debtor's mobile home. As relevant here, under K.S.A. 84-9-203(a), the debtor must have "signed a security agreement which contains a description of the collateral." K.S.A. 84-9-105(l) provides: "'Security agreement' means an agreement which creates or provides for a security interest." Applying the ordinary meaning of the words used in this definition, the provision that the note was secured by a mobile home would seem at least to "provide for," if not "create," a security interest. Yet, the debtor is correct that case law applying these UCC provisions has muddied their seemingly straightforward application.

In *Transport*, a case involving the Kansas version of the UCC, the Tenth Circuit indicated that a financing statement could not serve as a security agreement unless it contains "'granting' language." 518 F.2d at 380. The Circuit quoted an earlier decision in which it said:

"Cases and treatises construing [9-203 and 9-105] have almost uniformly come to the conclusion that in order for a security agreement to be effective *it must contain language which specifically creates or grants a security interest* in the collateral described.

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"The function of a financing statement is to put third parties on notice that the secured party who has filed it may have a perfected security interest in the described collateral. . . . *Absent language which would constitute the debtor's grant of a security interest*, a financing statement cannot serve as a security agreement." (Emphasis supplied).

518 F.2d at 380 (quoting *Mitchell v. Shepherd Mall State Bank*, 458 F.2d 700, 703, 704 (10th Cir. 1972) (involving the Oklahoma version of the UCC)). In light of later interpretations of *Transport*, the Court believes it is important to note that the *Mitchell* court also quoted the following from a North

Carolina case: ““While there are no magic words which create a security interest there must be language in the instrument which “leads to the logical conclusion that it was the intention of the parties that a security interest be created.””” 458 F.2d at 703 (quoting *Evans v. Everett*, 279 N.C. 352, 183 S.E.2d 109, 113 (1971)). Since *Transport* relied so heavily on *Mitchell* in determining that an ordinary financing statement did not also qualify as a security agreement, this Court would not have thought that the *Transport* court meant to create a requirement that “magic words” are necessary to create a security interest.

Nevertheless, some years later, in an opinion authored by the same judge who wrote *Transport*, the Tenth Circuit said that *Transport* and *Mitchell* require a security agreement to “contain language specifically granting a security interest in collateral.” *Pontchartrain State Bank v. Poulson*, 684 F.2d 704, 706 (10th Cir. 1982) (involving Oklahoma’s version of the UCC). The Circuit added, “In reaching this conclusion, these courts . . . equate the §9-105 ‘creates or provides for’ terminology with the word ‘grants.’” *Id.* The Circuit then distinguished this approach from one that had found the phrase, “This note is secured by a Security Interest in subject personal property as per invoices” to be sufficient to create a security interest. *Id.* (discussing *Nolden v. Plant Reclamation (In re Amex-Protein Development Corp.)*, 504 F.2d 1056, 1058-60 (9th Cir. 1974)). The promissory note before the Circuit did not qualify as a security agreement because the note said it was ““secured by pledge and delivery of the securities or property mentioned on the reverse,”” language that, according to the Circuit, did not specifically grant a security interest. *Id.* While the shift in language from the UCC’s “creates or provides for” to the Circuit’s “grants” seems subtle, it leads, as *Pontchartrain* shows, to the belief that a security agreement must expressly identify the party who is conveying a

security interest. “Creates or provides for,” on the other hand, allow the identity of the one giving the interest to be implied rather than explicitly set forth.

The Court notes that since *Pontchartrain* was decided, at least one Oklahoma state court has taken a more liberal view of the language required to create a security interest, ruling that a letter from the debtor constituted a security agreement because it said his contract rights under a construction contract were “to be use [sic] as collateral on our line of credit.” *First National Bank and Trust Co. v. McKown*, 867 P.2d 1342, 1345-47 (Okla. Ct. App.), *cert. denied* (1993).

That court briefly discussed *Pontchartrain* in the course of its decision, and so could not be said to have overlooked it. *Id.* at 1347. The court stated that, under Oklahoma law, intent controlled over form in the language required to create a security interest. *Id.* at 1345.

This Court believes Kansas state courts would, like the Oklahoma state court, take a more flexible approach to the creation of security interests. First, the Kansas Supreme Court regularly declares “The primary rule in construction of any contract is to ascertain the intent of the parties, and such intent may best be determined by looking at the language employed and taking into consideration all the circumstances and conditions which confronted the parties when they made the contract.” *Galindo v. City of Coffeyville*, 256 Kan. 455, 467 (1994). *See also City of Arkansas City v. Anderson*, 242 Kan. 875, syl. ¶1 (1988). Any rule requiring a security agreement to contain any particular words or phrases to create a security interest would contravene this rule, and the Kansas state courts would be unlikely to adopt it without more specific direction from the legislature than can be found in the UCC. Second, a UCC commentator on whom Kansas state courts often rely advises in his treatise:

In spite of authority to the contrary, the courts should not require formal words of grant in the security agreement as a condition of attachment. The mandate of Article 9 is only that the security agreement be signed by the debtor and contain a reasonable description of the collateral. There is no requirement for words of grant. In fact, such a requirement smacks of the antiquated formalism the drafters were trying to avoid. As long as the documentation as a whole fairly reflects a meeting of the debtor's and creditor's minds on the matter, magic words should not enter the picture. A filed financing statement, standing alone, will probably not do the job. However, in combination with other documentation, such as promissory notes, bills of sale, and written memoranda, the financing statement should be given weight in that direction. Although it has been suggested that the courts use an equitable lien theory imported under § 1-103 to give effect to a security agreement without formal words of grant, such a theory flies in the face of Official Comment 5 to § 9-203, which expressly rejects the notion. A better approach is simply to argue that the courts should not read into Article 9 a requirement that is not there, at least in the absence of a compelling reason.

Barkley Clark, *The Law of Secured Transactions Under the Uniform Commercial Code*

¶2.02[1][c] at 2-15 (rev. ed. 2000, A.S. Pratt & Sons). As required by these authorities, the statement in the promissory note that it was secured by the specified mobile home demonstrated the parties' intent to create a security interest and was adequate to do so.

Even if Kansas state courts would accept the *Pontchartrain* view that words of grant are required, the Court is convinced they would find that requirement fulfilled here by the language contained in the Preliminary Disclosure Statement and the Truth-in-Lending document. Unlike the promissory note, both these documents explicitly identify the debtor as the party giving the security interest. The only question about this result is whether the documents can be read together with the promissory note. The debtor contends they cannot, but the Court does not agree. The Kansas Supreme Court has stated:

It is well settled in this jurisdiction that where two or more instruments are executed by the same parties contemporaneously, or even at different times in the course of the same transaction, and concern the same subject matter, they will be read and construed together so

far as determining the respective rights and interests of the parties, although they do not in terms refer to each other.

*West v. Prairie State Bank*, 200 Kan. 263, 267 (1968). See also *Hollenbeck v. Household Bank*, 250 Kan. 747, 752 (1992) (citing this portion of *West*). Clearly, the three documents at issue here satisfy this rule: (1) each identifies the debtor and her ex-husband as the borrowers and the State Bank as the lender; (2) they were all signed on the same day; and (3) they concerned the same loan, as shown by the parties' identities, the loan number labels, and the amount of the loan stated on each. On at least one occasion involving the application of 84-9-105(1) and 84-9-203(1), the Kansas Court of Appeals has construed two documents together to determine that one of the parties involved intended to grant a security interest to the other in certain property, even though neither document contained any reference to the other document. *Baldwin v. Hays Asphalt Constr., Inc.*, 20 Kan. App. 2d 853, 855-57 (1995). Because of *West*, *Hollenbeck*, and *Baldwin*, this Court is convinced that Kansas state courts would read together the three documents involved here. Unlike the courts that decided the cases relied on by the debtor, the Kansas courts do not refuse to construe separate documents together simply because they do not expressly incorporate or refer to one another.

For these reasons, the Court concludes that the State Bank has a valid and enforceable security interest in the debtor's mobile home. Consequently, the State Bank's objection to the debtor's plan must be sustained to the extent the plan treats the bank as not having such a security interest.

IT IS SO ORDERED.

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

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JAMES A. PUSATERI  
CHIEF BANKRUPTCY JUDGE