

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

<b>IN RE:</b>	)	
	)	
<b>KENT C. THORNTON and</b>	)	
<b>ALISHCIA GWEN THORNTON,</b>	)	<b>Case No. 98-42828</b>
	)	
<b>Debtors.</b>	)	<b>Chapter 12</b>
_____	)	
	)	
<b>KENT C. THORNTON and</b>	)	
<b>ALISHCIA GWEN THORNTON,</b>	)	
	)	
<b>Plaintiffs,</b>	)	
	)	
<b>v.</b>	)	<b>Adversary No. 98-7124</b>
	)	
<b>CATTLE EMPIRE, L.L.C.,</b>	)	
	)	
<b>Defendant.</b>	)	
_____	)	

**ORDER DENYING DEFENDANT’S MOTION FOR  
PARTIAL SUMMARY JUDGMENT**

Cattle Empire L.L.C.’s motion for partial summary judgment seeks an order that there are no remaining issues of fact and that Cattle Empire is entitled to judgment as a matter of law that its security interest in Kent Thornton’s cattle is properly perfected. Debtors Kent and Alishcia Thornton have filed a response. Movant Cattle Empire appears by Eric D. Bruce and Petra H. Johnson of Bruce, Bruce & Holt, L.L.C., Wichita, Kansas. Kent and Alishcia Thornton appear by Timothy H. Girard of Woner, Glenn, Reeder & Girard, P.A., Topeka, Kansas.

The Thorntons filed their chapter 11 petition on October 9, 1998, and later converted the matter to Chapter 12. Confirmation of the Thornton’s plan, along with numerous other issues between and among debtors and their creditors remain pending. Cattle Empire, L.L.C. (“CE”)

holds several notes executed by Kent Thornton doing business as Thornton Cattle Company, apparently a sole proprietorship. CE's action in obtaining the ex parte appointment of receiver for the cattle company's assets in state court appears to have been the precipitant cause of this case's filing.<sup>1</sup> CE claims a security interest in all of the company's cattle fed on its premises or in feedyards associated with it. CE also claims security interests in some of debtors' other property. The Thorntons filed this adversary proceeding to avoid the CE liens as being unperfected using their hypothetical lien creditor powers under 11 U.S.C. §544(a)(1). CE moved for partial summary judgment that its security interest in Kent Thornton's cattle was properly perfected at the time of filing. After reviewing the parties' submissions the Court is prepared to rule on this very narrow point at this time.<sup>2</sup>

#### JURISDICTION

The Court has jurisdiction over this proceeding. 28 U.S.C. § 1334. This is a core proceeding. 28 U.S.C. § 157(b)(2)(K).

#### FACTS

The following are the court's findings of fact and conclusions of law as required by Fed. R. Civ. P. 52 as it is made applicable to bankruptcy in Fed. R. Bank. P. 7052. Debtor Kent

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<sup>1</sup>*Cattle Empire, L.L.C. v. Kent Thornton, et al.*, 26<sup>th</sup> Judicial District of Kansas, Case No. 98 C 30. This proceeding has been removed to this court by CE and is pending as Adversary No. 98-7126. This proceeding is concerned with, inter alia, the relative priority of the parties in certain Thornton cattle and their proceeds.

<sup>2</sup>Cattle Empire filed a Motion for Partial Summary Judgment on August 7, 2000. The Thorntons filed a Response and Objection to Cattle Empire's Motion for Partial Summary Judgment on August 31, 2000. The Thorntons then filed a Supplement to Response and Objection to Cattle Empire's Motion for Partial Summary Judgment on September 13, 2000, to which Cattle Empire filed a Response to Objection of Kent and Alishcia Thornton to Cattle Empire's Motion for Partial Summary Judgment on September 14, 2000.

Thornton made, executed and delivered to CE a certain “Note Agreement” dated May 31, 1998, pursuant to which he borrowed \$200,000 under the terms of a “Loan Agreement” of even date. Kent also signed a security agreement that day. The terms of the Security Agreement included the grant of a security interest in “...the property described in Section 2 [of the Agreement]... .”

Section 2 is entitled “Collateral” and provides in part as follows:

The Borrower grants and assigns to the Lender a security interest in the following property together with all additions, accessions, replacements, substitutions, proceeds, and products therefrom including natural increase of livestock and any and all property of a similar type or kind now owned or hereafter acquired and used for either personal, family or household purpose; farming or ranching operations...

LIVESTOCK: All livestock branded or unbranded or hereafter acquired by way of replacement, substitution, increase, or addition *being fed at Cattle Empire LLC or any facility associated with and including the aforementioned facility.* [emphasis added].

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Also included is language purporting to grant to CE a security interest in Kent’s inventory, accounts receivable and general intangibles. The Security Agreement is signed by Kent alone. The Agreement further provides in a separately numbered paragraph, that the collateral will be kept at CE’s facility at Satanta, Kansas.

CE filed two financing statements, also signed only by Kent, which describe as its collateral “[a]ll livestock branded or unbranded on feed in any facility associated with and including the above named facility.” CE’s financing statements make no mention of the inventory, accounts or other collateral described in the Security Agreement. The financing statements were filed on September 12, 1995 and October 18, 1995. While CE’s Security Agreement specifically references proceeds, the financing statements do not.

It is further uncontroverted that Thornton partnered cattle with CE, pastured cattle for CE,

and borrowed money from CE. In the Thorntons' complaint, they allege that CE has failed to perfect its security interest in the property not described in the financing statements. However, in paragraph 16 of their complaint, they appear to concede that the creditor's lien in the cattle kept at CE may be properly perfected, at least as to Kent Thornton's interest in same.

Thornton's response asserts the following as additional uncontroverted facts. First, Thornton alleges that at the time of filing, he had no cattle in which CE claimed an interest. He further alleges that he had no cattle in his own name on feed at CE. He adds that he sometimes kept cattle he bought with loan proceeds at his farm and not at CE's lots. Thornton also states that he has never been in any business partnership or association with CE and that CE's liens in his inventory, general intangibles, accounts, commodities accounts, and Alishcia's property are all unperfected.

At issue is whether there is any material dispute that CE's security interest in the cattle of Kent Thornton and its proceeds were properly perfected at the time of bankruptcy. CE only seeks a determination that its security interest in the cattle and its proceeds are properly perfected. CE's motion does not address the balance of the allegations made in Thorntons' complaint.

#### DISCUSSION

Rule 56 of the Federal Rules of Civil Procedure governs summary judgment and is made applicable to adversary proceedings by Rule 7056 of the Federal Rules of Bankruptcy Procedure. Rule 56, in articulating the standard of review for summary judgment motions, provides that judgment shall be rendered if all pleadings, depositions, answers to interrogatories, and admissions and affidavits on file show that there are no genuine issues of any material fact and the moving party is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(c); Fed. R. Bankr. P. 7056. In determining whether any genuine issues of material fact exist, the Court must construe the

record liberally in favor of the party opposing the summary judgment. McKibben v. Chubb, 840 F.2d 1525, 1528 (10<sup>th</sup> Cir. 1988) (citation omitted). An issue is “genuine” if sufficient evidence exists on each side “so that a rational trier of fact could resolve the issue either way” and “[a]n issue is ‘material’ if under the substantive law it is essential to the proper disposition of the claim.” Adler v. Wal-Mart Stores, Inc., 144 F.3d 664, 670 (10<sup>th</sup> Cir. 1998).

Based on the record at hand, and guided by the forgoing standards, the court finds that Thornton signed the Loan and Note Agreements as well as the financing statements. The Security Agreement described all of Thornton’s cattle, along with other classes of collateral, as noted above. The financing statement does not cover any cattle of Thornton’s save those being fed at CE or feedlots associated with CE. In an effort to stretch the reach of its financing statement to cattle not being kept at CE facilities, CE asserts that, because of Thornton’s relationship with it as a backgrounder and agister, Thornton’s operation was somehow “associated” with CE’s sufficiently to include all of the Thornton’s cattle within the ambit of its financing statements. Thornton denies that this rises to the level of association contemplated in the financing statement and, at a minimum, there is a material dispute as to this “fact.” Further, CE makes no representation regarding the degree and extent of Thornton’s cattle holdings in which it claims an interest. For his part, Thornton asserts he had no cattle at the time of filing which would be included in the class of cattle described in the financing statement or which were on feed at a yard “associated” with CE. Drawing all inferences adverse to CE as the moving party, the Court cannot find that there were (or were not) any cattle in Thornton’s possession at the time of filing which would fall under CE’s financing statement. Neither can the Court find on this record that Thornton’s association with CE as a provider of pasture and feed rose to the level of “association” contemplated in the financing statements.

The language of CE's financing statements is unambiguous. CE clearly intended that it retain possession, constructive or actual, of the cattle it financed, and that it retain a purchase money security interest in them. Therefore, it employed language limiting the scope of its lien by location of the cattle. By its plain meaning, the language in the financing statement "on feed" does not include cattle kept at Kent Thornton's ranch that might later be fed at Cattle Empire. CE's position that this language may now be disregarded as somehow being superfluous ignores the state of the law. Kan. Stat. Ann. 84-9-402(1) provides that a financing statement shall contain "...a statement ... describing the items of collateral." Kan. Stat. Ann. 84-9-110 provides that any description of goods required by any provision of Article 9 of the Uniform Commercial Code is "...is sufficient whether or not it is specific if it reasonably identifies what is described." Admittedly, this is a broad standard, however, it is not without limits.

In In re California Pump & Mfg. Co., Inc., 588 F.2d 717 (9<sup>th</sup> Cir. 1978), the Ninth Circuit considered the effect of a security agreement and financing statement which limited their reach to items of the debtor's property held or stored at a given street address in San Francisco. In an effort to defeat the trustee's effort to avoid its lien in certain property of the debtor stored at Fresno and Hayward under the 1898 Act's equivalent of §544, the creditor asserted that this description was sufficient to place a lien creditor on notice of its security interest in property other than the San Francisco collateral. The Ninth Circuit declined to allow the creditor to admit parol evidence to vary the otherwise unambiguous language of the agreements. The Court held that, under UCC 9-110, because of the geographic limitation, the collateral in Fresno and Hayward was not "reasonably identified," the creditor's interest did not attach, and, accordingly, the Court had no need to reach the issue of the sufficiency of the financing statement.

While there appears to be no Kansas authority directly on point, the Kansas Court of

Appeals has considered the effect of a security agreement and financing statement which references location of collateral. In First Nat'l Bank & Trust Co. v Atchison Auction Co., 10 Kan. App. 2d 382, 699 P.2d 1032, rev. denied, 237 Kan. 886 (1985), the Court distinguished between the security agreement before it which attached all of the debtor's collateral, but included a covenant that cattle would be kept at various places, and a financing statement which described collateral as being located in a certain situs. In holding the auction company liable for converting the proceeds of cattle in which the Bank had an interest, the Court held that the covenant as to locale did not modify the scope of the security agreement. The Kansas Court of Appeals cited with approval the Ninth Circuit's decision in California Pump but, as the Bank's security documents did not purport to limit the extent of the Bank's security, the California Pump result was distinguishable. Id. at 386.

The security agreement in Atchison County Auction contained a separate paragraph, which followed the granting clause and descriptive paragraphs, and which simply provided that the debtor's cattle would be kept at three locations in Shawnee, Wabaunsee and Stanton Counties in Kansas. CE's financing statement language that specifically provided for a lien only in cattle at its feedyard and those associated with it is very different. Because CE appears to have drafted the contents of the financing statement, the Court may presume that CE intended the consequences of its unambiguous language. In any case, the limiting language cannot simply be jettisoned at the convenience of the creditor. The only collateral "reasonably identified" in these documents is Kent Thornton's cattle at CE's facility or facilities associated with it.

With respect to the proceeds of Kent Thornton's cattle, the word "proceeds" is not found in the financing statements. CE argues it need not be in order to perfect. Indeed, *to the extent the proceeds of collateral are identifiable*, a security agreement and financing statement covering

designated collateral will also attach and perfect its security interest in the proceeds. See 1996 Comment, Kan. Stat. Ann. 84-9-203; 84-9-306. Kan. Stat. Ann. 84-9-306(3)(b) deems a secured party's security interest in the proceeds of the original collateral perfected to the extent the filed financing statement covers the identifiable original collateral and its proceeds. Further protected is the secured party by subsection (2) of 9-306 which provides for the preservation of a security interest in the original collateral in the hands of a third party if the collateral's disposition was unauthorized by the creditor. This broad species of protection is limited, however, where the debtor is in an insolvency proceeding. In that event, the secured party's interest in proceeds is perfected only to the extent the proceeds are identifiable and neither commingled nor deposited before the proceeding was filed. Kan. Stat. Ann. 84-9-306(4)(b). Where the proceeds have been commingled, the secured party's interest in proceeds is perfected only to the extent of the amount of proceeds received into the accounts within the ten days preceding the filing less certain other amounts as more fully described in Kan. Stat. Ann. 84-9-306(4)(d). There are no facts pleaded which would bear on these issues and the identifiability of the proceeds seems more germane to the trial of the companion adversary proceeding among all of the secured creditors in the case.

Finally, the Court is unable to find that the facts surrounding what cattle Kent Thornton may have owned at the time of filing are uncontroverted. While Thornton's schedules indicate the ownership of some cattle, Thornton's response suggests that all of the cattle which would be subject to CE's security interest were sold before the filing. Because of the existence of the companion adversary and additional claimants to the cattle proceeds, the Court is aware of a continuing controversy among several creditors concerning the relative priority security interests in the proceeds of certain cattle. This continued dispute, together with the lack of a record concerning Thornton's holdings, preclude this court from concluding as a matter of law *on this*

*record* that CE's security interest in the Thornton cattle at CE's yard was properly perfected. Little purpose would be served by this Court's speculative determination concerning the perfection of a lien which may, in fact, be without value.

CE's motion is therefore DENIED. The Court declines to reach any issues concerning the validity and perfection of CE's interests in any of Kent's other property or any property of Alishcia's in this ruling. Furthermore, nothing contained herein shall be deemed to affect or determine the relative priority of CE's and any other creditor's security interest in any of the Thorntons' property and these issues shall be preserved for trial.

**IT IS SO ORDERED.**

Dated this 15th day of September, 2000.

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THE HONORABLE ROBERT E. NUGENT  
UNITED STATES BANKRUPTCY JUDGE

## CERTIFICATE OF SERVICE

The undersigned certifies that copies of the **ORDER DENYING DEFENDANT'S MOTION FOR PARTIAL SUMMARY JUDGMENT** was deposited in the United States mail, postage prepaid on this 15th day of September, 2000, to the following:

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Janet Swonger