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CLERK SUPREME COURT

IN THE COURT OF APPEALS OF IOWA

HENRY COUNTY CREDIT UNION,)
Appellee,) Filed February 14, 1977
vs.)
WATERS IMPLEMENT COMPANY,) 43/54853
Appellant.)

Appeal from Henry District Court - Harlan W. Bainter, Judge.

Defendant implement dealer appeals judgment in replevin action awarding plaintiff credit union possession of tractor - Affirmed.

Gary L. Wiegel, of Mt. Pleasant, for appellee.

Donald E. Gartin, of Mt. Pleasant, for appellant.

Submitted to Allbee, C.J., and Donielson, Snell, Oxberger and Carter, JJ.

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OXBERGER, J.

This is an action in replevin brought by the plaintiff, Henry County Credit Union, to recover possession of a Model 730 John Deere tractor from the defendant, Waters Implement Company. Each claims a security interest in the tractor under respective security agreements with David Burns, a mutual debtor.

The trial court held that the credit union possessed an enforceable security agreement that had attached to the subject tractor and that the "Defendant had only an open account as concerns the $1130." The trial court further held § 554.9312, The Code, afforded the credit union's interest a priority over the claim of the implement company. We affirm.

The implement company appeals on the ground that prior to the filing which perfected the credit union's security interest it had perfected a security interest in the tractor by possession. The implement dealer asserts in its brief the following:

> "In the defendant's trial brief, the statutory sections were cited in support of the proposition of law that a secured party having a private security agreement with a debtor and having perfected its security agreement by possession of collateral pursuant to the security agreement has a priority as to the collateral which is superior to the claims of a third party claiming under a security agreement without a perfected security interest which continued unperfected at and after the possessory secured party perfected its security interest by possession. (Defendant's Trial Brief, 6, pp. 4-6)" A't. B. 9.

We read the trial court's conclusion to focus on the threshold question of whether the implement dealer had established a security agreement in its transaction with the debtor. We do not quarrel with counsel's presentation of the law. If the implement dealer and the debtor created a security interest in the tractor by their transaction, possession in the implement company would indeed perfect that interest. See §§ 554.9203(1)(a), 554.9302(1)(a), and 554.9305, The Code. Such an interest would defeat the unperfected secured creditor, the credit union.

We acknowledge this appeal could perhaps have been avoided with a specific finding by the trial court that the implement dealer had failed to establish a valid security agreement. In reviewing the trial court's findings of fact, we view the evidence in the light most favorable to upholding the judgment, as we must do in this law action. Holm v. Hansen, 248 N.W.2d 503, 505 (Iowa 1976); Farmers Insurance Group v. Merryweather, 214 N.W.2d 184, 186 (Iowa 1974). We think it is clear that the following language indicated the implement company's failure to establish a security agreement:

> "The Court further finds that this down payment was treated as an open account item by the defendant . . . " R. 18.

And later,

> "After the assignment the Court believes the defendant had only an open account as concerns the $1130." R. 20.

The trial judge assumed that open accounts are not secured debts. We are convinced he found the implement company failed to establish that its transaction with its debtor was intended to create a security interest in the tractor. The implement company views the question as which creditor perfected first. The trial court viewed the issue as which creditor's security interest had attached. Attachment, under the Code is a pre-requisite to perfection. Under § 554.9303(1), The Code, "A security interest is perfected when it has attached and when all of the applicable steps required for perfection have been taken."

Under § 554.9204(1), The Code, "A security interest cannot attach until there is agreement that it attach and value is given and the debtor has rights in the collateral. . . . " Under § 554.1201(3), The Code, "'Agreement' means the bargain of the parties in fact. . . . " We note also that § 554.1201(37), The Code, defines "security interest" as "an interest in personal property or fixtures which secures payment or performance of an obligation. . . .

Accordingly, under the Uniform Commercial Code the implement company would have to establish that its transaction with its debtor was intended to create a security interest in the tractor, § 554.9102(1)(a), The Code. That is, the implement company would have to show that the tractor was held as collateral - the property subject to a security interest, § 554.9105(1)(c), The Code - for the debt owing from Burns.

The trial court specifically applied the requirements of § 554.9204(1) to the credit union's agreement and found an agreement, value given, and debtor's rights in the collateral to establish a valid security interest. We are convinced that its ruling regarding the implement company's claim is best viewed as a failure to establish a security agreement, one of the requisites of § 554.9204(1).

Although the implement company has not raised the issue of whether it established an agreement to create a security interest as a matter of law, we shall consider this issue. There is no dispute that prior to acquiring possession of the tractor the implement dealer had only an open account indebtedness with Burns. The defendant has not asserted that an open account is a secured transaction. Section 554.9102, The Code, enumerates the various forms of security interests; an open account is not included.

The key issue is whether the defendant and Burns had a meeting of the minds to create a security agreement. Burns was not called as a witness. At the time of the transaction, Burns was already in default. Security interests are normally created to protect the creditor from possible defaults by the debtor in the future. Common experience tells us that ordinarily a debtor who is in default who delivers possession of the property that is the subject of the indebtedness does so with the intent to satisfy his debt.

Burns sought an immediate sale of the tractor, not a sale in the future if he failed to pay. There is no evidence Burns intended to make any additional payments. The implement company was in the business of selling tractors. It is probable Burns delivered possession of the tractor to the dealer because he was in a better position to sell the tractor and thereby satisfy Burn's debt. We do not find the implement dealer has established a security agreement with Burns as a matter of law.

Since the implement company failed to establish its claim to secured creditor status, we look next to the status of the credit union. At the time the implement company acquired possession, the credit union had not filed its financing statement. It could claim only the priority due an unperfected secured creditor. Section 554.9301, The Code, lists the interests which subordinate such an unperfected secured interest. Specifically, the implement company's claim as possessor of the tractor would have to be brought under § 554.9301(1)(c). That subsection allows a buyer "not in ordinary course of business to the extent he gives value and receives delivery of the collateral without knowledge of the security interest and before it is perfected . . . " to defeat an unperfected secured creditor.

Section 554.1201(9) defines the term buyer in the ordinary course of business. A buyer in the ordinary course of business buys from one in the business of selling goods of this kind. Burns is not such a seller; therefore in this transaction the implement company is a buyer not in the ordinary course of business. However, § 554.1201(9) further defines buying as to exclude a transfer in total or partial satisfaction of a money debt. The transfer of possession from Burns to the implement company was in total or partial satisfaction of a money debt. The implement company is not a secured creditor and the credit union is not subordinated to the implement company's rights

in § 554.9301, The Code.

Under § 554.9501(1), The Code, when a debtor is in default under a security agreement, the secured creditor may " enforce the security interest by any available judicial procedure." An action in replevin by the credit union was properly brought to secure possession of its collateral upon Burn's default.

A secured creditor may acquire possession through a replevin action or under § 554.9503, The Code. However, both procedures require the debtor to be in default on the obligation. This point has not been raised so we do not consider it.

We affirm.