

IN THE UNITED STATES BANKRUPTCY COURT FOR THE
SOUTHERN DISTRICT OF MISSISSIPPI
EASTERN DIVISION

U.S. BANKRUPTCY COURT SOUTHERN DISTRICT OF MISSISSIPPI FILED	
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IN RE:

ERNEST T. GEORGE, JR.
BETTYE L. GEORGE

CASE NO. 8601755MC

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Edward Ellington, Bankruptcy Judge

OPINION AND ORDER ON "MOTION FOR USE OF
PROPERTY OF THE ESTATE" FILED BY THE DEBTORS

An order for relief under 11 U.S.C. Chapter 11 was entered on a petition filed by Ernest T. and Bettye L. George on September 8, 1986. The Debtors filed a "Motion for Use of Property of the Estate" on January 8, 1987. The Farmers Home Administration

(FmHA) filed an "Objection to Debtor's Motion for Use of Property of the Estate." Memorandum Briefs were submitted by both parties. The parties entered a "Stipulation of Facts and Exhibits", and subsequently an "Amendment to Stipulation of Facts." Numerous orders have been entered authorizing the Debtor to use some of the money in the FmHA supervised account for the payment of expenses. The following is a summary of the stipulated facts:

On August 21, 1979, Debtors received two (2) loans from the United States of America acting by and through the Farmers Home Administration, United States Department of Agriculture (FmHA), each loan being evidenced by a separate promissory note as follows:

<u>Date Executed</u>	<u>Original Principal Amount</u>	<u>Annual Interest Rate</u>
August 21, 1979	\$ 87,760.00	3%
August 21, 1979	\$111,240.00	9%

On August 21, 1979, Debtors executed a security agreement granting FmHA a security interest in Debtors' farm and other equipment. On the same day, August 21, 1979, the FmHA also filed a financing statement with the Noxubee County Chancery Clerk's Office. This financing statement covered: "(c)rops, livestock, other farm products, farm and other equipment, supplies and inventory." (Emphasis added).

A statement of continuation was filed by the FmHA on August 13, 1984, continuing this financing

statement which was originally filed on August 21, 1979.

On April 3, 1981, Debtors received an additional two (2) loans from FmHA, each loan being evidenced by a separate promissory note as follows:

<u>Date Executed</u>	<u>Original Principal Amount</u>	<u>Annual Interest Rate</u>
April 3, 1981	\$35,230	5%
April 3, 1981	\$49,000	13%

On April 3, 1981, Debtors executed a security agreement granting FmHA a security interest in Debtors' crops, farm and other equipment and 224 head of cattle. On the same date, April 3, 1981, FmHA filed a financing statement with the Noxubee County Chancery Clerk's Office. This financing statement also covered "(c)rops, livestock, other farm products, farm and other equipment, supplies and inventory."

On August 27, 1982, Debtors executed a security agreement granting FmHA a security interest in Debtor's crops, farm and other equipment and 224 head of cattle.

On April 3, 1986, the financing statement which was filed on April 3, 1981 lapsed. (Note: The stipulation in paragraph 11 uses the date April 31, 1986, but this is obviously a typographical error.)

As of October 30, 1986, Debtors owed FmHA \$268,074.70 in unpaid principal plus \$110,568.75 in unpaid interest.

CONCLUSIONS OF LAW

The issues before this Court are whether the FmHA has a valid security interest in the cattle of the Debtors and the proceeds and, if so, whether the Debtors are entitled to the use of the proceeds of the sale of the cattle as cash collateral.

In their brief the Debtors argue:

"Since the original security agreement executed by debtors in favor of FmHA excluded cattle as collateral, each financing statement/promissory note/security agreement that has been executed in favor of FmHA must be viewed on its own merits, and independently of the other documents executed by debtors in favor of FmHA, since there is a variance in the description of the collateral (at least in the security agreements) that FmHA claims it has a lien upon. In this regard, there is no combination of security agreement/financing statement/ promissory note (that is still in full force and effect and has not lapsed) which would grant, to FmHA, a lien upon debtors' existing cattle."

"CONCLUSION

Because there is a variance in the description of the collateral in the security agreements executed by debtors to FmHA, with respect to the cattle owned by debtors, and because there are no existing financing statements / security agreements which are still valid (due to the lapse) which grant, to FmHA, a lien upon debtors' collateral, the attempted claim, by FmHA, that it is secured by debtors' cattle must fail as against the debtor-in-possession / trustee. Accordingly, debtors' cattle are, accordingly, free and clear of liens or claim liens by the FmHA."

(Memorandum Brief of Debtors, pp. 8, 9).

According to the Stipulation of Facts (S.F.), the Amendment to Stipulation of Facts (A.S.F.) and the Exhibits attached thereto, it is undisputed that on August 21, 1979, a proper U.C.C. financing statement was filed with the Chancery Clerk of Noxubee County. The financing statement covered crops, livestock, other farm products, farm and other equipment, supplies and

inventory, including proceeds and products thereof. (S.F. Ex. #4) (Emphasis added). This financing statement was continued by the filing of a proper U.C.C. continuance statement in the office of the aforesaid Chancery Clerk on August 13, 1984.

It is also undisputed that the original security agreement dated August 21, 1979, excluded and did not cover cattle. (S.F. Ex. #3). However, the two subsequent security agreements dated April 3, 1981, and August 27, 1982, both specifically covered all livestock, together with all increases, replacements, substitutions and additions thereto, including but not limited to 140 cows, 4 bulls and 80 calves, described in the security agreements. (S.F.A. Ex. #6A; S.F. Ex. #8).

By their terms, the security agreements were for the purposes of securing any present and future indebtednesses of the debtors.

In order to enforce a security interest in collateral against third parties, which would be the debtor-in-possession as a trustee in the case at bar, a financing statement must be filed. Miss. Code Ann. §75-9-302 (Supp. 1986) and §75-9-312 (Supp. 1986).

Miss. Code Ann. §75-9-402(1) clearly states that a financing statement may be filed before a security interest is made or a security agreement attaches:

A financing statement may be filed before a security agreement is made or a security interest otherwise attaches. . . .

Miss. Code Ann. §75-9-303(1) defines perfection:

(1) A security interest is perfected when it has attached and when all of the applicable steps required for perfection have been taken. Such steps are specified in Sections 9-302, 9-304, 9-305 and 9-306 [§§75-9-302, 75-9-304, 75-9-305, and 75-9-306]. If such steps are taken before the security interest attaches, it is perfected at the time when it attaches. (Emphasis added).

The Official Comment to §9-402(1) of the 1972

Official Text of the Uniform Commercial Code states:

2. What is required to be filed is . . . only a simple notice which may be filed before the security interest attaches or thereafter. The notice itself indicates merely that the secured party who has filed may have a security interest in the collateral described.

(T)he financing statement is effective to encompass transactions under a security agreement not in existence and not contemplated at the time the notice was filed, if the description of collateral in the financing statement is broad enough to encompass them.

Consequently, if a financing statement is filed prior to the creation of a security agreement, then perfection occurs at the time the security interest attaches to the collateral.

In the case at bar, FmHA acquired rights in Debtors' cattle through the April 3, 1981 security

agreement. Upon the attachment of the April 3, 1981 security interest in Debtors' cattle, the security interest became perfected due to the previously filed August 21, 1979 financing statement which covered live-stock. Miss. Code Ann. §75-9-402(1) (1972) and Miss. Code Ann. §75-9-303(1) (1972). The April 3, 1981 financing statement which lapsed was not necessary to perfect the FmHA's security interest in the cattle since the earlier August 21, 1979 financing statement which was continued on August 13, 1984, was sufficient for perfection.

Neither party has cited any authoritative Mississippi decisions on this issue in their respective briefs. Although there appears to be no Mississippi state court decision interpreting this particular part of §75-9-402(1), a number of decisions made under the law of other states have held that under U.C.C. §9-402 a financing statement may be filed prior to the existence of the security interest. See: Sekutera v. Mason State Bank (In re Sekutera), 62 B.R. 387 (Bankr.D.Neb. 1986); Matter of Springfield Casket Co., 21 B.R. 223 (Bankr.S.D.Ohio 1982); John Deere Co. v. Production Credit Assn., 686 SW 2d 904 (TN 1984) (PCA has valid security interest in combine even though financing statement was filed prior to purchase); In re Tenpenny, 64 B.R. 217 (Bankr.E.D. Tenn. 1986) (1979 financing statement of FmHA which included equipment perfected

the 1981 security agreement entered into by parties); Deutz-Allis Credit Corp.v. Lynch Farms, Inc., 387 NW 2d 593 (Iowa 1986)(Financing statement may be filed before security agreement is entered into); Matter of United Thrift Stores, Inc., 242 F.Supp. 714 (D.N.J. 1965) (Financing statement may be filed prior to security agreement); Thorp Credit Inc. v. Nason (In re Nason), 13 B.R. 984 (Bankr. D.R.I. 1981) (1978 financing statement operates to perfect 1980 security interest); United States v. Gleaners and Farmers Co-operative Elevator Company, 481 F.2d 104 (7th Cir. 1973) (1964 financing statement was sufficient to perfect 1968 security interest); Miner v. Farmers Home Administration (In re Ellis), 55 B.R. 671 (Bankr. W.D.Mo. 1985) (1981 financing statement was sufficient to perfect 1984 security agreement in crops.)

The Debtors cite the case of King vs. U.S. (Matter of King), 67 B.R. 50 (Bankr.M.D.Fla. 1986) in support of their position. However, that case is distinguishable on its facts. In the opinion it is noted that a previously filed financing statement is effective to perfect a later security interest, citing In re Nason, 13 B.R. 984 (Bankr.D.R.I. 1981).

The Debtors also cite the case of In re Martin Grinding and Machine Works, Inc., 793 F.2d 592 (7th Cir. 1986) and other cases as authority for the proposition that the language of the security

agreement is controlling and that a financing statement cannot be used to enlarge the security interest in the Debtor's collateral. This point is well taken; however, the FmHA is not trying to expand its security interest through its financing statements. Both the April 3, 1981 and August 27, 1982 security agreements include the Debtors' cattle. Unlike Martin Grinding where the Bank's security agreements did not include accounts receivable and inventory, but the Bank tried to use its financing statements and loan documents to create a security interest, the FmHA relies upon its security agreements and not its financing statements for its security interest in the Debtors' cattle.

CONCLUSION

Miss. Code Ann. §75-9-402(1) provides that a financing statement may be filed before a security agreement is made or otherwise attaches. FmHA filed a financing statement on August 21, 1979, which included livestock. This financing statement was properly continued on August 13, 1984. Thus, at all times material herein there was on file a proper financing statement covering the cattle of the Debtors. Although the security agreement dated August 21, 1979, excluded cattle, the security agreements dated April 3, 1981, and April 27, 1982, clearly included and covered the cattle of the Debtors and the proceeds thereof. Thus,

at all times material herein, from and after April 3, 1981, the FmHA has had a properly perfected security agreement in the cattle of the Debtors and all proceeds thereof.

In order to determine whether the Debtors are entitled to use the proceeds from the cattle as cash collateral and, if so, what they should provide the FmHA in the way of adequate protection, a separate hearing will be held at a time to be scheduled by the Court.

SO ORDERED this the 25 day of May, 1988.


U. S. BANKRUPTCY JUDGE