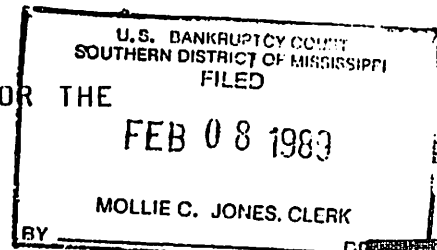


IN THE UNITED STATES BANKRUPTCY COURT FOR THE
SOUTHERN DISTRICT OF MISSISSIPPI
JACKSON DIVISION



IN RE:

HUDSON SHIPBUILDERS, INC.

CASE NO. 8307199SC

C. THOMAS ANDERSON, TRUSTEE

PLAINTIFF

vs.

ADVERSARY NO. 870874SC

BORG-WARNER INSURANCE
FINANCE CORPORATION

DEFENDANT

C. Thomas Anderson
P. O. Box 566
Ocean Springs, MS 39564

Trustee

Barry H. Powell
Thomas, Price, Alston, Jones
& Davis
P. O. Drawer 1532
Jackson, MS 39215-1532

Attorney for Defendant

Edward Ellington, Bankruptcy Judge

MEMORANDUM OPINION AND ORDER

On February 9, 1983, Hudson Shipbuilders, Inc. ("Hudship") filed its petition under Chapter 11 of the U. S. Bankruptcy Code. The case was subsequently converted to Chapter 7 by order of this court on September 4, 1985, and C. Thomas Anderson was appointed Trustee.

The Trustee commenced this adversary proceeding seeking to avoid alleged preferential transfers by Hudship to Borg-Warner Insurance Finance Corporation ("BWIFC") on or within ninety (90) days prior to the filing by Hudship of its Chapter 11 petition. The complaint is based on §547 of the Bankruptcy Code.

The matter is before the court on the Motion for Summary Judgment filed by the defendant, BWIFC.

The relevant facts are these: BWIFC finances insurance premiums. On July 19, 1982, Hudship entered into a written Insurance Premium Finance Agreement with BWIFC whereby BWIFC financed the payment of premiums for certain policies of insurance for Hudship in the operation of its business. One of the provisions in the Agreement provided that as security for the payment of the amounts owed by Hudship to BWIFC as set forth in the Agreement, Hudship assigned to BWIFC all unearned insurance premiums refundable upon the cancellation of any of the policies of insurance financed pursuant to the Agreement. The Agreement also provided that in the event Hudship defaulted in making the payments due to BWIFC then Hudship granted to BWIFC a power of attorney to cancel the policies of insurance which it had financed, to receive the unearned premiums which had been assigned to it and to apply the unearned premiums to the indebtedness.

On August 5, 1982, BWIFC executed a written notice of acceptance of the agreement and mailed it to Hudship. On the same date it gave written notice to the insurance companies whose policies had been financed pursuant to the agreement that Hudship had assigned to it any unearned premiums and that it was entitled to cancel the policies and receive the unearned premiums in the event Hudship defaulted in the payments which it was to make.

BWIFC did not attempt to file a financing statement and to perfect its security interest under the Mississippi version of the Uniform Commercial Code. Miss. Code Ann. §75-1-101 et seq. (1972).

Within the 90 days immediately prior to Hudship filing its petition in bankruptcy on February 9, 1983, Hudship paid to BWIFC the total amount of \$81,827.50. These payments were for installment payments and late charges due under the Insurance Premium Financing Agreement and it is these payments which the Trustee is attempting to have set aside as preferential payments.

During all times material, BWIFC had a collateral security interest in the unearned insurance premiums and it also held a power of attorney authorizing it to cancel the policies of insurance which it had

financed in the event it did not receive its installment payments from Hudship. On the date Hudship filed its petition, February 9, 1983, if BWIFC had exercised its right to cancel the policies of insurance, the unearned premiums would have been equal to \$298,382.07 if a pro-rata calculation had been applied by the insurance companies and \$236,082.51 if a "short rate" calculation had been applied by the companies. On February 9, 1983, the total amount owed to BWIFC by Hudship was \$76,948.00. If BWIFC had not received the payments in the total amount of \$81,827.50 which are asserted as preferences, the total amount owed by Hudship to BWIFC on the date of filing would have been \$158,775.50.

CONCLUSIONS OF LAW

The parts of §547 of the Bankruptcy Code pertinent to this matter provides as follows:

(b) [T]he trustee may avoid any transfer of an interest of the debtor in property --

(1) to or for the benefit of a creditor;

(2) for or on account of an antecedent debt owed by the debtor before such transfer was made;

(3) made while the debtor was insolvent;

(4) made --

(A) on or within 90 days before the date of the filing of the petition;

. . .

(5) that enables such creditor to receive more than such creditor would receive if --

(A) the case were a case under chapter 7 of this title;

(B) the transfer had not been made; and

(C) such creditor received payment of such debt to the extent provided by the provisions of this title.

The Trustee argues that pursuant to the "strong arm clause" of §544(a) of the Bankruptcy Code he has the status of a judicial lien creditor; that the defendant, BWIFC, failed to perfect its security interest in the unearned premiums pursuant to the Mississippi version of the Uniform Commercial Code, Miss. Code Ann. §75-9-101 et seq. (1972); that because of this failure the defendant's claim to the unearned premiums were subordinate to those of the trustee pursuant to Miss. Code Ann. §75-9-301(1)(b) (1972); and, thus the payments by Hudship to BWIFC were preferences because they allowed it to receive more than it would have if the case were a case under Chapter 7 and the payments had not been made.

The defendant, BWIFC, argues that it was a fully secured creditor and that the security interest which it had in the unearned insurance premiums was exempted from the filing requirements of Chapter 9 of the Uniform Commercial Code. It then argues that as a

fully secured creditor, contrary to §547(b)(5) of the Bankruptcy Code, the payments which it received did not enable it to receive more than it would receive if the case were a case under Chapter 7 of the Code and if the payments had not been made and if BWIFC had received payment of such debt to the extent otherwise provided by the Code. Thus, it argues, the payments were not preference payments.

The Mississippi version of the Uniform Commercial Code is found at Miss. Code Ann. §75-1-101 et seq. (1972). Chapter 9 of Title 75 applies to secured transactions. Section 75-9-102 sets forth the scope of the chapter and §75-9-104 enumerates the transactions that are excluded from the scope of Chapter 9. Miss. Code Ann. §79-9-104 (1972) specifically provides in part:

This chapter does not apply . . .
(g) to a transfer of an interest or claim in or under any policy of insurance, except as provided with respect to proceeds (section 75-9-306) and priorities in proceeds (section 75-9-312); . . .

The references to §75-9-306 and §79-9-312 do not have any applicability to the facts in this case.

Thus, the court is of the opinion and so finds that pursuant to the language of Miss. Code Ann. §75-9-104 (1972), the Uniform Commercial Code does not apply to the written insurance premium financing agreement which is involved in the case at bar.

Thico Plan, Inc. vs. Maplewood Poultry Company (Matter of Maplewood Poultry Co.), 2 B.R. 550, 554 (Bankr.D.Me. 1980); Premium Financing Specialists, Inc. v. Lindsey, 11 B.R. 135 (E.D.Ark. 1981).

In order to determine the relative rights of the trustee and the creditor the Court must look to the "strong arm" provision of §544 of the Bankruptcy Code and to the common law of Mississippi. In essence, §544 of the Code gives the trustee the status of a judicial lien creditor as of the time of the commencement of the case.

The question then evolves as to whether on February 9, 1983, BWIFC's interest in the unearned premiums was secured to the extent that it could prevail against a judicial lien creditor.

The written financing agreement contained the following language:

The undersigned insured:

1. Assigns to BWIFC as security for the total amount payable hereunder any and all unearned return premiums and dividends which may become payable under the policies listed in the schedule, and loss payments under said policies which reduce the unearned premiums (subject, however, to any mortgagee or loss payee interests.)

The agreement also contained language which allowed BWIFC to cancel the policies of insurance and receive the unearned premiums in the event Hudship

defaulted in its payment to BWIFC. As previously stated, BWIFC executed a written notice of acceptance of the agreement and mailed it to Hudship. It also gave written notice to the insurance companies that the unearned premiums had been assigned to it.

This Court is of the opinion and so finds that BWIFC was a properly secured creditor at the time the payments were made and at the time this case was commenced on February 9, 1983, pursuant to the reasoning contained in International Harvester v. Peoples Bank & Trust Co., 402 So.2d 856 (Miss. 1981), and cases cited therein.

Essentially, the law as it applies to the facts in this case is that a valid assignment of a debt or contract conveys the entire interest of the assignor (Hudship) to the assignee (BWIFC) and thereafter the assignor (Hudship) has no interest therein, even when the debtor (the insurance companies) might not have notice of the assignment. The assignment of the unearned insurance premiums is exempted from the filing requirements of the Uniform Commercial Code and thus the assignment will prevail against subsequent judicial lien creditors of the assignor.

As previously noted in the recitation of relevant facts, on the date of filing the unearned premiums, which served as security, exceeded the amount

of debt which would have been owing to BWIFC if the payments had not been made within ninety days before the date of filing.

For the reasons setforth, the Court finds that there is "no genuine issue as to any material fact"; that the payments did not constitute preferences; and that the defendant's Motion for Summary Judgment should be granted. Celotex Corp. v. Catrett, 477 U.S. 317, 106 S.Ct. 2548, '91 L.Ed 2d 265 (1986).

IT IS ORDERED that the attorney for the debtor shall prepare an appropriate separate judgment consistent with the opinion as required by Bankruptcy Rule 9021. He shall submit it to the attorney for the trustee for signature indicating approval as to form.

ORDERED this the 8TH day of February, 1989.



U. S. BANKRUPTCY JUDGE