

UNITED STATES BANKRUPTCY COURT
EASTERN DISTRICT OF NEW YORK

In re:

CASE NO. 899-90170-478

COLONIAL TRANSPARENT
PRODUCTS CO., INC.,

Debtor.

DECISION & ORDER

COLONIAL TRANSPARENT
PRODUCTS CO., INC.,

Plaintiff,

v.

AP #800-8112-478

RO-AN INDUSTRIES CORPORATION,

Defendant.

BACKGROUND

On December 14, 1999, Colonial Transparent Products Co., Inc. ("Colonial") filed a petition initiating a Chapter 11 case, which is now a liquidating Chapter 11. On April 4, 2000, Colonial commenced an Adversary Proceeding against Ro-An Industries Corporation ("Ro-An") to obtain a determination that the lien which Ro-An claimed on a 30" high-speed wicketeer, including accessories, (the "Equipment") could be avoided pursuant to Section 544.¹

¹ Section 544 provides in part that:

(a) The trustee shall have, as of the commencement of the case, and without regard to any knowledge of the trustee or of any creditor, the rights and powers of, or may avoid any transfer of property of the debtor or any obligation incurred by the debtor that is voidable by -

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The Complaint in the Adversary Proceeding alleged that: (1) on or before December 12, 1997, Colonial had purchased the Equipment from Ro-An for \$125,000.00; (2) on or about December 12, 1997, the Equipment was delivered and installed at Colonial's manufacturing facility in Hicksville, New York; (3) on or about December 12, 1997, Colonial signed a UCC-1 financing statement (the "Financing Statement") which Ro-An filed with the New York Secretary of State on or about December 29, 1997; (4) Ro-An forwarded a January 31, 1998 invoice to Colonial (the "Final Invoice") which stated, "Ro-An to hold UCC papers"; (5) Colonial never signed a security agreement as required by Section 9-203(1) of the New York Uniform Commercial Code (the "UCC")²; (6) neither the Financing Statement nor the Final

(1) a creditor that extends credit to the debtor at the time of the commencement of the case, and that obtains, at such time and with respect to such credit, a judicial lien on all property on which a creditor on a simple contract could have obtained such a judicial lien, whether or not such a creditor exists;

(2) a creditor that extends credit to the debtor at the time of the commencement of the case, and obtains, at such time and with respect to such credit, an execution against the debtor that is returned unsatisfied at such time, whether or not such a creditor exists [.]

11 U.S.C. § 544(a)(1) - (2) (2000).

² Section 9-203(1) of the UCC provides that:

(1) Subject to the provisions of Section 4-208 on the security interest of a collecting bank, Sections 9-115 and 9-116 on

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Invoice, when viewed individually or together, constituted the written security agreement signed by the debtor as required by Section 9-203(1)(a) of the UCC; and (7) since Colonial never signed the required security agreement, as a debtor-in-possession with the rights and powers of a trustee under Section 544, it could avoid any lien that Ro-An claimed on the Equipment.³

In defending the Adversary Proceeding, Ro-An asserted that there were additional documents, which when read together with the Financing Statement and the Final Invoice, satisfied the UCC

security interests in investment property, and Section 9-113 on a security interest arising under the Article on Sales, a security interest is not enforceable against the debtor or third parties with respect to the collateral and does not attach unless:

- (a) the collateral is in the possession of the secured party pursuant to agreement, the collateral is investment property and the secured party has control pursuant to agreement, or the debtor has signed a security agreement which contains a description of the collateral and in addition, when the security interest covers crops growing or to be grown or timber to be cut, a description of the land concerned; and
- (b) value has been given; and
- (c) the debtor has rights in the collateral.

CLS Uniform Commercial Code § 9-203(1) (2000).

³ At the time of trial, the parties agreed that Colonial had more than one place of business within the State of New York so that in order to meet the perfection requirements of the UCC, Ro-An only had to file the Financing Statement with the New York Secretary of State.

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requirement of a written security agreement, or otherwise clearly evidenced the intent of Colonial to grant Ro-An a security interest in the Equipment. These additional documents were: (1) an August 21, 1997 check made payable to Ro-An, drawn on an account in the name of M.R. Packaging Products, Inc., in the amount of \$42,000.00, signed by Mark Rosenfeld, one of the principals of Colonial, which represented a \$30,000.00 down payment on the Equipment (the "Down Payment Check"), as well as a down payment on an additional machine purchased by Colonial; (2) an August 22, 1997 Order Confirmation (the "Confirmation"), prepared on a Ro-An form, which: (a) purported to confirm a verbal customer purchase order for the Equipment; (b) was signed only by Ro-An and not by Colonial; and (c) included the language, "Ro-An to hold UCC papers"; (3) a bill of lading (the "Bill of Lading"), signed on behalf Colonial, to indicate that the Equipment was delivered to it; and (4) a December 17, 1997 invoice (the "December Invoice") covering the Equipment, which was essentially the same as the Final Invoice and also included the language, "Ro-An to hold UCC papers."

A trial was conducted on November 30, 2000 before the Hon. John C. Ninfo, II, Chief Judge of the United States Bankruptcy Court for the Western District of New York, sitting by the

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authority of the United States Court of Appeals for the Second Circuit as a Visiting Judge in the Bankruptcy Court for the Eastern District of New York. At the trial, the Court heard the testimony of Lester H. Goldstein, President of Colonial, and Angelo Cervera, President of Ro-An.

DISCUSSION

In *In re Lanzatella*, 254 B.R. 84 (Bankr. W.D.N.Y. 2000), I addressed the need for a creditor to demonstrate that it had a security interest which had been both properly created and properly perfected in order to have a priority over the interest of a trustee or Debtor-in-Possession with the status of a "Perfect Lien Creditor" under Section 544.

As in *Lanzatella*, the documents offered by Ro-An do not satisfy the requirements of New York Law which would permit this Court to find that it has a security interest in the Equipment with priority over the interest of Colonial, as a Debtor-in-Possession.

The Courts in this Circuit have consistently held that the execution of a financing statement alone is not sufficient to satisfy the UCC requirement that there be a written security agreement signed by the debtor which describes the collateral. See 254 B.R. 84; *In re Baker*, 48 B.R. 932 (Bankr. W.D.N.Y.

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1989); *In re Modafferi*, 45 B.R. 370 (Bankr. S.D.N.Y. 1985); and *In re Coffee Cupboard*, 33 B.R. 668 (Bankr. E.D.N.Y. 1983).

With respect to the additional documents that Ro-An has asserted when read together with the Financing Statement and Final Invoice clearly demonstrate that Colonial intended to grant it a security interest in the Equipment, and, therefore, satisfy the requirement of a written security agreement, I disagree. First, the Down Payment Check: (a) in no way identifies the Equipment or indicates that there is to be a security interest retained in the Equipment; and (b) would have been issued even if the sale had been on credit, with no retained security interest. Second, the Confirmation was never signed on behalf of Colonial, it was only prepared and signed by Ro-An, and the language "Ro-An to hold UCC papers" is ambiguous and does not, in a document signed or prepared by it, evidence Colonial's intent that there be a security interest retained by Ro-An in the Equipment.⁴ Third, the Bill of Lading: (a) although signed by Colonial, does not have any language indicating that there was to be a security interest retained in the Equipment; (b) only evidences the fact that the Equipment was delivered;

⁴ At trial, Angelo Cervera's testimony indicated that he was not sure what "Ro-An to hold UCC papers" meant.

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and (c) would have been signed by Colonial even if the sale had been on credit with no retained security interest. Finally, the Invoices were not signed by either party, and, again, the language "Ro-An to hold UCC papers" is ambiguous, and does not, in a document signed or prepared by it, evidence Colonial's intent that there was to be a security interest retained by Ro-An in the Equipment.

In the few well-reasoned cases where courts have found that other documents, when read together or with a financing statement, were sufficient to satisfy the requirements of the UCC, those other documents confirmed a clear and unambiguous grant by the debtor of a security interest and either: (1) were signed by the debtor; or (2) were prepared by the debtor. That is not the case with the additional documents offered by Ro-An.

Furthermore, the testimony at trial of Angelo Cervera, the President of Ro-An, indicated that the failure of Ro-An to obtain a signed security agreement from Colonial which contained a description of the Equipment was not inadvertent. Mr. Cervera's testimony made it clear that, although over many years and many transactions it had attempted and intended to retain a perfected security interest in the equipment it sold to certain buyers, Ro-An never had those buyers sign a separate security

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agreement which described the equipment being purchased, as required by the UCC. As Judge Howard Schwartzberg expressed in his decision in *In re Modafferi*, the requirements for the creation and perfection of a security interest are so simply and clearly set forth that it is not unreasonable to insist that a creditor who seeks to obtain such a priority status over other creditors in a bankruptcy case comply with these minimal requirements. 45 B.R. at 373. Here, it is clear that Ro-An, even though it was a sophisticated commercial business that felt it important in some of its credit sale transactions to retain a security interest in the equipment being sold, never intended to fully comply with the simple, clear and minimal requirements of the UCC.

CONCLUSION

The documents offered by Ro-An do not satisfy the requirements of New York Law which would permit this Court to find that Ro-An holds a valid perfected security interest in and lien on the Equipment with priority over the interest of Colonial, as a Debtor-in-Possession, with its status as a "Perfect Lien Creditor" under Section 544. Any lien that Ro-An may have in the Equipment is avoided.

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IT IS SO ORDERED.

HON. JOHN C. NINFO, II
CHIEF U.S. BANKRUPTCY JUDGE

Dated: February 12, 2001