UNITED STATES BANKRUPTCY COURT
WESTERN DISTRICT OF NEW YORK

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In re

COURTNEY & MORSE, INC. Case No. 97-14938 K

Debtor

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This matter came before the Court on Key Bank's Motion to lift the stay so that it may pursue its state law remedies with respect to certain personal property (the "Collateral") of the Debtor, Courtney & Morse. The stay was lifted and the dispute shifted to the proceeds of the Collateral. Key Bank claims that the Collateral was the subject of a security agreement entered into by Key Bank and the Debtor, pursuant to the Debtor's guaranty of a loan to a related entity, Acorn Products, Inc. Key Bank cannot produce the security agreement (it has been lost) but argues that there is sufficient other evidence to establish the grant of a security interest, and argues that consequently it need not produce the agreement. The Chapter 7 Trustee argues that without the agreement, he cannot determine, *inter alia*, whether the collateral was properly described.

The procedural posture is awkward; no evidentiary hearing has been conducted. Therefore, the Court deems Key Bank's submission to be an offer of proof and a request that its motion be set over for an evidentiary hearing. The Court finds that the offer fails.

In its offer of proof, Key Bank refers to six documents which, it argues, should be taken as a whole to prove the existence of a security agreement encumbering certain personal property of the Debtor:

(1) a guaranty of Acorn's obligation to Key Bank, signed by the Debtor which defines "collateral" as "all property . . . rights, and interests . . . granted to [Key Bank] from whatever source security (sic) payment of all or any portion of the indebtedness [owed by Acorn to Key Bank]";

(2) a document (which was attached to the guaranty) which shows that the Debtor's shareholders consented to and authorized the Debtor to grant a security interest "in any of [the Debtor's] now and hereafter acquired property . . . to security (sic) said guaranty and the indebtedness guaranteed therein."

(3) a Board of Directors Resolution (also attached to the guaranty) which resolved that the Debtor "grant a mortgage and security interest in any of its now owned and hereafter acquired property . . . to secure [Acorn]" and that "any of the officers of [the Debtor] . . . are . . . authorized and directed to execute . . . and deliver to the Bank such agreements and documents of guaranty, mortgage, and security. . ."

(4) a Financing Statement ("UCC 1") signed by the Debtor and Key Bank which purported to perfect a security interest in "All inventories and accounts receivable wherever located, whether now owned or existing or hereafter acquired or arising (all to secure all present and future indebtedness)."

(5) the affidavit of an officer of Key Bank who had possession of the file pertaining to these alleged transactions, stating that the Bank was not able to locate the security agreement.

(6) Schedule D of the Debtor's chapter 7 petition which listed Key Bank as a secured

creditor.

*See* Key Bank's Memo of Law, at 1-4

Federal Rule of Evidence 1004(1) states the rule on the use of secondary evidence:

> The original is not required, and other evidence *of the contents of a writing*, recording, or photograph is admissible if -
>
> (1) Originals lost or destroyed. All originals are lost or have been destroyed, unless the proponent lost or destroyed them in bad faith;

Fed.R.Evid. 1004(1) (emphasis added).

The proponent of the secondary evidence, however, must establish the existence and execution of the original writing and the contents of the writing by clear and convincing evidence." 29A Am. Jur. 2d *Evidence* § 1054 (1994). Key Bank seems to avoid the suggestion that the secondary evidence it offers satisfies the "best evidence" rule as to the lost document.[1] Rather, Key Bank argues that the secondary evidence itself is enough - cumulatively - to satisfy the requirement that the intention of the parties be "expressed in the composite documents." *In re Bollinger Corp.*, 614 F.2d 924 (3d Cir. 1980).

Assuming that this Court would agree with the cases cited by Key Bank, they do not help the Bank here. No case cited by Key Bank stands for the proposition that a pertinent document that was known to have existed can be ignored. Rather, *all* documentation must be

[1]Key Bank implicitly recognizes that it has offered not a scintilla of proof that a security agreement was in fact executed or what it in fact said -- no photocopy, no affidavit of a witness with personal knowledge of what it said and how it was executed, etc. Thus the "best evidence" rule would not avail the Bank.

considered because incongruities among the documents as to such matters as a description of the collateral would defeat the claim of the creditor. *See In re Talco Contractors, Inc.*, 140 A.D. 2d 834 (App. Div. 3d Dept. 1988).

That a security agreement was or is in existence here, but cannot be produced by the Key Bank, is dispositive. Even good faith and lack of fault does not permit Key Bank to profit from its failure to produce the document. 23 Am. Jur. 2d *Depositions and Discovery* § 376 (1983). Rather, it may be inferred, adverse to Key Bank, that the security agreement would be inconsistent with the UCC 1, instead of consistent with it. *Id.*

In sum, the "Composite Document Rule" argued by Key Bank cannot be applied when a dispositive document, known to have existed, cannot be produced by the party who lost the document and who would benefit from the Rule. (The Court makes no statement here about the viability of such a Rule in a proper case.)

The Bank's offer of proof, consequently, fails to convince the Court of the utility of an evidentiary hearing. The Motion to lift the stay as to the proceeds of the Collateral is denied.

SO ORDERED.

Dated: Buffalo, New York
November 25, 1997

/s/ Michael J. Kaplan

U.S.B.J.