Not Reported in N.W.2d, 2013 WL 1629300 (Mich.App.), 80 UCC Rep.Serv.2d 609
(Cite as: 2013 WL 1629300 (Mich.App.))

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UNPUBLISHED OPINION. CHECK COURT RULES BEFORE CITING.

UNPUBLISHED

Court of Appeals of Michigan.
MONROE BANK & TRUST, Plaintiff,
v.
CHIE CONTRACTORS, INC. and Gerald M. Chie, Defendants,
Blackstone Equipment Financing, L.P., Intervening Plaintiff–Appellant,
v.
Monroe Bank & Trust, Intervening Defendant–Appellee,
and
The Receiver for Chie Contractors, Inc., Gerald M. Chie, and David J. Chie, Intervening Defendants.

Docket No. 310226.
April 16, 2013.

Washtenaw Circuit Court; LC No. 11–000752–CK.

Before: M.J. KELLY, P.J., and CAVANAGH and MURRAY, JJ.

PER CURIAM.

***1** Intervening plaintiff, Blackstone Equipment Financing, LP (Blackstone), appeals as of right an order in favor of plaintiff, Monroe Bank & Trust (plaintiff), in this lienholder priority dispute. We affirm in part, reverse in part, and remand for further proceedings consistent with this opinion.

Plaintiff is a secured creditor of Chie Contractors, Inc. (CCI). After CCI defaulted on promissory notes and a security agreement, plaintiff filed a multi-count complaint seeking, among other relief, possession of CCI's collateral and the appointment of a receiver. After a receiver was appointed, Blackstone objected to the receiver disposing of CCI's collateral, arguing that it was a first-priority lienholder with regard to certain CCI equipment. Thereafter, Blackstone filed a motion to intervene and sought leave to file a complaint on the ground that it was the senior lienholder with regard to certain CCI equipment. Blackstone's motion was granted and it was permitted to file a complaint. In its multi-count complaint, Blackstone sought declaratory and other relief regarding its claim that it was a first-priority lienholder regarding certain CCI equipment. Subsequently, the trial court entered an order directing that plaintiff and Blackstone submit briefs regarding the priority dispute.

In support of its claim that it was a first-priority lienholder in certain CCI equipment, Blackstone argued that, on April 29, 2005, plaintiff filed an amended UCC financing statement that terminated its blanket lien on CCI's assets. Consequently, a security interest of Financial Federal Credit, Inc. (Financial), a subsequent lien creditor, assumed a priority position. After Financial terminated its financing statement, Commercial Credit Group, Inc. (Commercial), a subsequent lien creditor, assumed the priority position because, on February 26, 2007, plaintiff had executed a subordination agreement in favor of Commercial. Then Commercial assigned its rights obtained by the subordination agreement to Blackstone; thus, Blackstone became the senior lienholder with regard to certain CCI equipment. Accordingly, Blackstone argued, it was entitled to repossess its own equipment without the use of a receiver.

In support of plaintiff's position that it was the

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first-priority lienholder of CCI's collateral, plaintiff argued that, on June 14, 1996, it filed its first UCC financial statement perfecting its lien on all of CCI's assets. A continuation statement was filed on March 7, 2001. Thereafter, on March 9, 2005, an amended financial statement was filed which reflected a collateral change; the deletion of two pieces of equipment. Plaintiff noted that Blackstone's claim arose from an amended financial statement that was filed on April 29, 2005. That amended statement was filed with two incongruous boxes checked, the "Termination" box and the "Amendment (Collateral Change)" box. With regard to the collateral change, the deleted equipment was noted as a "1987 Dyna Pack CA25PD Roller." Although the collateral change was clearly indicated on the UCC form, Blackstone claimed that, because the "Termination" box was also checked, plaintiff's security interest in all of CCI's collateral was terminated. Plaintiff argued that Blackstone's claim must fail because plaintiff's financing statement was not "seriously misleading" as set forth in MCL 440.9506(1). That is, because both incongruous boxes were checked on the amended financial statement, an interested third-party would be on notice that a possible prior encumbrance on the collateral existed. Further, plaintiff filed a second all-asset financing statement on August 3, 2005, as well as a continuation statement in 2006 related to the initial financing statement, years before Blackstone became a secured creditor of CCI.

***2** Plaintiff also argued that the subordination agreement, dated February 26, 2007, between plaintiff and Commercial limited the subordination to specifically designated property and only as to a "present/contemplated financing." The restrictive subordination agreement did not require that plaintiff subordinate its interest with regard to a new creditor, a new amount, and new property. Further, the purported assignment between Commercial and Blackstone was ineffective because there was no indication in any of the documentation that Commercial assigned to Blackstone the underlying debt obligation associated with Commercial's security interest. To the contrary, it appeared that CCI paid off its debt to Commercial in full; thus, the purported assignment did not include a corresponding indebtedness. Accordingly, plaintiff argued, it was the first-priority lienholder in CCI's collateral, including the disputed equipment.

At a hearing on the lien priority dispute, the trial court held:

> The Court finds that based upon the authorizes [sic] and arguments set forth in the briefs of the plaintiff, Monroe Bank and Trust, that the security interest of Monroe Bank and Trust and all of the assets of CCI including, without limitation, all of the CCI equipment constitutes a first priority lien senior to any lien claim of Blackstone, that as a result thereof Monroe Bank and Trust is entitled to all net proceeds from the sale or other disposition of the CCI equipment through the receivership or otherwise.

Thereafter, an order consistent with the ruling was entered and, attached as Exhibit 1, was a listing of the CCI equipment ("the disputed CCI equipment") in which plaintiff held a first-priority lien. After Blackstone's motion for reconsideration was denied, this appeal followed.

Blackstone argues that the trial court erroneously concluded that plaintiff was a first-priority lienholder of the disputed CCI equipment because plaintiff terminated its security interest and, alternatively, plaintiff agreed to subordinate its security interest to Blackstone's assignor. We agree in part and disagree in part.

Blackstone's motion for leave to file a complaint, which included a request for declaratory relief and a finding that it held a first-priority lien, was granted by the trial court. Thereafter, briefs were submitted and the matter was decided. This Court reviews de novo a

trial court's ruling in a declaratory action. *Toll Northville LTD v. Northville Twp.*, 480 Mich. 6, 10; 743 NW2d 902 (2008). Questions of law, including issues of statutory interpretation, arising from a declaratory judgment action are also reviewed de novo. *Detroit City Council v. Detroit Mayor*, 283 Mich.App 442, 449; 770 NW2d 117 (2009); *Green Oak Twp. v. Munzel*, 255 Mich.App 235, 238; 661 NW2d 243 (2003).

Blackstone first argues that plaintiff filed a termination statement which terminated its security interest in the disputed CCI equipment; thus, plaintiff could not be considered a first-priority lienholder with respect to that equipment. Although Blackstone appears to argue that Delaware law applies, because the debtor is located in Michigan, Michigan law governs this matter involving the priority of a security interest in collateral. See MCL 440.9301(a), 440.9307(5). Secured transactions are governed by Article 9 of the Michigan Uniform Commercial Code (UCC), MCL 440.9101 *et seq.*

***3** On June 14, 1996, plaintiff filed its financing statement perfecting its secured interest in CCI's property, and described the collateral as: "All Assets, 'All Accounts, Equipment Vehicles, Inventory, Furniture, Documents, Chattel Paper, Instruments and General Intangibles including any right to any refund of taxes, whether now or hereafter owned, existing or acquired, including but not limited to accounts receivable.' " See MCL 440.9504. On March 7, 2001, plaintiff filed a continuation statement indicating that the financing statement was still effective. See MCL 440.9515.

On April 29, 2005, plaintiff filed an amendment of the financing statement. Pursuant to MCL 440.9512, a financing statement can be amended so as to delete collateral covered by the financing statement or terminate the effectiveness of the financing statement. In this case, plaintiff's amended financing statement purported to do both; paragraph two relating to "Termination" and its corresponding box was checked, and paragraph eight relating to "Amendment (Collateral Change)" and its corresponding box was checked. The specific collateral deleted was noted to be a "1987 Dyna Pack CA25PD Roller." Blackstone argues on appeal, as it did in the trial court, that the amended financing statement constituted a termination statement regardless of the obvious collateral deletion notation. We do not agree.

A filed financing statement "serves as notice to the world that a secured party of record may have a secured interest in the collateral described, and invites further inquiry to disclose the complete state of affairs." 68A Am Jur 2d, Secured Transactions, § 304. That is, "the financing statement's purpose is merely to alert third parties to the need for further investigation," not to provide the details of security arrangements. *Id.* Thus, another party is charged with possessing the information that could have been discovered if that party had made inquiries suggested by the filing. 68A Am Jur 2d, Secured Transactions, § 305. Consistent with this notice purpose, MCL 440.9506(1) provides: "A financing statement substantially satisfying the requirements of this part is effective, even if it has minor errors or omissions, unless the errors or omissions make the financing statement seriously misleading." A financing statement is considered "seriously misleading," then, if it fails to serve its "central purpose of providing notice to third parties of the possible interest of the secured creditor, which would lead interested parties to inquire further to get the full picture." *Continental Oil Co. v. Citizens Trust & Savings Bank*, 397 Mich. 203, 213; 244 NW2d 243 (1976) (dissenting opinion by Williams, J).

In this case, the amended financing statement was not seriously misleading. The amended financing statement served its central purpose of providing simple notice to third parties of the *possible* interest of a secured creditor, plaintiff. In fact, because both boxes corresponding to termination *and* an amendment due to a collateral change were checked, plus a

specific piece of equipment was named, any interested party should have realized that further investigation was required to ascertain plaintiff's actual interest. This was not an obscure error; it was plainly apparent on the face of the financing statement. And because of the incongruous nature of the error—termination of the financing statement versus merely deletion of one stated item of collateral—the financing statement provided notice to an interested party that further inquiry was required "to get the full picture." *Id.*

***4** Further, we reject Blackstone's argument that MCL 440.9513(4) applies under the facts of this case. MCL 440.9513(4) provides that "upon the filing of a termination statement with the filing office, the financing statement to which the termination statement relates ceases to be effective." Because the form filed erroneously indicated that it was both a collateral change amendment and a termination, it was not merely a "termination statement" within the contemplation of MCL 440.9513(4). Blackstone has cited no authority in support of its claim that the amended financing statement should be accorded the distinction of a termination statement rather than simply a collateral change amendment and we could find no such authority. Further, Blackstone has never argued that plaintiff's financing statement was no longer indexed in the filing office after the contested amendment was filed. In fact, plaintiff filed a continuation of that statement in February 2006, as well as a second all-asset financing statement on August 3, 2005, years before Blackstone became a secured creditor of CCI.

Blackstone's reliance on several inapposite cases does not support its argument that plaintiff's amended financing statement had to be found "seriously misleading." In all of those cases, including *In re Kitchin Equip. Co. of Virginia, Inc.*, 960 F.2d 1242 (CA 4, 1992),[FN1] *JI Case Credit Corp v. Foos*, 11 Kan App 2d 185; 717 P.2d 1064 (1986), *In re Pacific Trencher & Equip, Inc*, 27 BR 167 (CA 9, 1983), and *Tuftco Sales Corp. v. Garrison Carpet Mills, Inc.*, 158 Ga App 674; 282 S.E.2d 159 (1981), the secured creditors erroneously filed termination statements. However, not one of those secured creditors checked both the box corresponding to termination *and* another box corresponding to a change in collateral. That is, all of the termination statements unambiguously terminated the secured interest; accordingly, an interested third party would have no notice of the possible interest of the secured creditor. Therefore, we agree with the trial court's apparent conclusion that plaintiff's erroneous filing of an amended financial statement did not terminate its security interest in the collateral at issue.

FN1. In Blackstone's brief on appeal, it misleadingly asserts that the "secured party checked both the 'termination' box and the 'partial release box.' " However, the court clearly indicated that, while a "partial release of collateral" box was present on the form, the secured creditor "did not check this box." The only box checked was the "box marked termination." *In re Kitchin Equip Co of Virginia, Inc.*, 960 F.2d 1242, 1246 (CA 4, 1992).

In the alternative, Blackstone argues, plaintiff's execution of a subordination agreement in favor of Blackstone's assignor, Commercial, on February 26, 2007, caused Blackstone's security interest to have priority over plaintiff's security interest in the disputed CCI equipment. We agree.

The UCC provides that, unless displaced by particular provisions, the principles of law and equity shall supplement UCC provisions. MCL 440.1103; see also *Conagra, Inc. v. Farmers State Bank*, 237 Mich.App 109, 131; 602 NW2d 390 (1999). Thus, in the absence of a controlling UCC provision, questions concerning the scope and effect of a subordination agreement are resolved according to the principles of contract interpretation. *Id.* The goal of contract interpretation is to ascertain and enforce the intent of the parties. *Shay v. Aldrich*, 487 Mich. 648, 660; 790 NW2d 629 (2010). "A contract must be interpreted

according to its plain and ordinary meaning." *Holmes v. Holmes*, 281 Mich.App 575, 593; 760 NW2d 300 (2008). Clear and unambiguous contractual language must be enforced as written. *Holland v. Trinity Health Care Corp.*, 287 Mich.App 524, 527; 791 NW2d 724 (2010).

***5** In July 2005, Commercial filed a financing statement perfecting its security interest in CCI collateral, including the disputed CCI equipment. On February 26, 2007, plaintiff entered into a subordination agreement with Commercial. The agreement provided in pertinent part:

> To secure its present or contemplated financing, [Commercial] has or expects to acquire a **security interest** in the items described herein below together with all **attachments**, accessories, substitutions, replacements, replacement parts, software and software upgrades thereto and all cash and non-cash proceeds thereof (including rental proceeds, insurance proceeds, accounts and chattel paper arising out of or related to the sale, rental or other disposition thereof) (the "Property"):
>
> Describe Property or "See Attached Schedule for Property Description"
>
> By signing below, you agree that your **security interest** or other lien, if any, in the Property ... shall and will be subordinate to any **security interest** or other interest which [Commercial] may have or may hereafter acquire in the Property. In the event [Commercial] is the Lessor and the owner or [Commercial] becomes the owner of the Property, you agree that you disclaim and release any security interest, other lien or other interest in the Property.
>
> No other party shall have the benefit of this agreement except that if [Commercial] assigns its present/contemplated financing to a third party, then such assignee shall have all of the rights and benefits of [Commercial] hereunder.

The Schedule A attached to the subordination agreement listed nineteen pieces of equipment manufactured by Caterpillar. Thereafter, on March 1, 2007, Commercial filed a UCC financing statement which included the equipment listed on the Schedule A attached to the subordination.[FN2]

> FN2. Exhibit 1 of the trial court's order in this matter listed 16 pieces of CCI equipment, 12 of which are included in this Schedule A.

Plaintiff argues on appeal that the subordination agreement clearly applied only to specifically designated property, the property set forth in Schedule A. We agree. If Commercial had asserted a priority claim with respect to the specifically listed equipment, plaintiff's objection to such a claim would fail, but only as to the equipment set forth in the Schedule A, consistent with the plain language of the subordination agreement.

Plaintiff also argues that the subordination agreement "did not contemplate a carte blanche agreement by [plaintiff] to subordinate to any and all future financing by either [Commercial] or any of its assigns; it was only as to the 'present/contemplated financing.' " We agree. The clear object of the subordination agreement was for Commercial "[t]o secure [Commercial's] present or contemplated financing, [Commercial] has or expects to acquire a security interest in the items described herein below...." The "items described herein below" were the pieces of equipment set forth in the Schedule A. But as clearly set forth in the next paragraph, plaintiff only agreed that its security interest "in the Property [as set forth in Schedule A] ... shall and will be subordinate to any security interest or other interest which [Commercial] may have or may hereafter acquire in the Property [as set forth in Schedule A]."

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***6** The next paragraph also clearly allowed assignment of Commercial's "present/contemplated financing" to a third party, who would then acquire the same rights that Commercial would have if it asserted a priority claim with respect to the equipment listed in Schedule A. Thus, we reject plaintiff's claim that the subordination agreement did not contemplate assignment. The "present financing" was evidenced by the UCC financing statement filed in July 2005, before the subordination agreement. The "contemplated financing" was eventually evidenced by the UCC financing statement filed on March 1, 2007, very shortly after the execution of the subordination agreement. The Schedule A attached to both the subordination agreement and the 2007 financing statement were identical. Thus, if Commercial assigned any interest to Blackstone that arose from the subordination agreement with plaintiff, the interest that Blackstone acquired was the same interest that Commercial had in that regard: a first-priority interest in the equipment listed in the Schedule A. "[A]n assignee stands in the shoes of the assignor and acquires the same rights as the assignor possessed." *Prof. Rehab Assoc. v. State Farm Mut. Auto. Ins. Co.*, 228 Mich.App 167, 177; 577 NW2d 909 (1998).

However, plaintiff argues, the assignment from Commercial to Blackstone was invalid and unenforceable because the underlying debt giving rise to Commercial's security interest was extinguished before the assignment. We disagree.

The executed assignment between Commercial and Blackstone provided, in relevant part:

> Blackstone Equipment Finance, L.P. ("Blackstone") is presently contemplating refinancing the above-referenced obligation of [CCI] to [Commercial]. Toward that end [CCI] has provided to Blackstone [Commercial's] October 1, 2008 payoff letter.
>
> Blackstone has requested, in connection with said refinancing, that [Commercial] assign to Blackstone its security interest securing [CCI's] above account with [Commercial] (evidenced by UCC–1 financing statement # 2007033853–2 filed with the Michigan Secretary of State on March 1, 2007 and UCC–1 financing statement # 2005129072–7 filed with the Michigan Secretary of State on 7/19/05 (the "Assignment"). Provided that, on or before October 1, 2008, [Commercial] receives the Payoff Amount ... in good funds, then upon such receipt by [Commercial], it herein agrees to such Assignment, subject to the terms set forth below:
>
> 1. Upon [Commercial's] receipt of payment, [Commercial] hereby authorizes Blackstone to file a UCC–3 statement evidencing the Assignment of [Commercial's] security interest to Blackstone, deleting [Commercial] as the secured party, and changing the name of the secured party to Blackstone ...;and
>
> 2. [Commercial's] Assignment is made without recourse to [Commercial], or representations or warranty of any kind, express or implied, by [Commercial].

On October 7, 2008, Blackstone filed a UCC financing statement amendment referencing Commercial's assignment to Blackstone.

***7** Plaintiff apparently is arguing that the assignment between Commercial and Blackstone was not supported by consideration and, thus, was invalid. An assignment is a contract and must be supported by consideration. *The Meyer & Anna Prentis Family Foundation, Inc. v. Barbara Ann Karmanos Cancer Institute*, 266 Mich.App 39, 58; 698 NW2d 900 (2005). "Manifestly, to constitute a consideration there must be a detriment to one or a benefit to the other." *Steep v. Harpham*, 241 Mich. 652, 655; 217 NW 787 (1928). For example, "if A has no claim

against B but asserts an unfounded one, and C gives his note to A to settle such unfounded claim, A has parted with nothing and C has received nothing and the note is without consideration." *Id.* at 655–656. However, "[a]n antecedent or a preexisting debt constitutes valuable consideration." *Traverse City Depositors' Corp. v. Case*, 297 Mich. 304, 309; 297 NW 501 (1941); see also *Ann Arbor Const. Co. v. Glime Const. Co.*, 369 Mich. 669, 674; 120 NW2d 747 (1963).

Here, Commercial had a security interest in the CCI equipment forth in Schedule A. Blackstone offered to refinance the debt that CCI owed to Commercial, i.e., "payoff" CCI's obligation to Commercial, in exchange for Commercial assigning, in relevant part, its security interest in the CCI equipment set forth in Schedule A of the subordination agreement. Thus, the assignment was supported by consideration. Commercial received the benefit of repayment of CCI's preexisting debt as a consequence of its agreement to assign its present security interest in certain CCI equipment to Blackstone. Thus, plaintiff's argument premised on a lack of consideration is without merit. Accordingly, Blackstone acquired by assignment a first-priority interest in the CCI equipment listed in the Schedule A of the subrogation agreement between plaintiff and Commercial. Plaintiff remained the first-priority lienholder with regard to all other CCI collateral listed in plaintiff's initial financing statement for the reasons discussed above.

Therefore, the trial court's order holding that plaintiff is the priority lienholder with regard to all of the equipment listed in its Exhibit 1 is erroneous. Of the 16 pieces of equipment listed in the trial court's Exhibit 1, 12 are the same as listed in the Schedule A of the subordination agreement. Blackstone is the priority lienholder with regard to those 12 pieces of equipment. The pieces of equipment in which plaintiff is the priority lienholder have the following serial numbers: SPD202, C683256, 01M2298, and A420360. Thus, we reverse the trial court's order and remand for entry of an order consistent with this opinion.

Affirmed in part, reversed in part, and remanded for further proceedings consistent with this opinion. We do not retain jurisdiction.

Mich.App.,2013.
Monroe Bank & Trust v. Chie Contractors, Inc.
Not Reported in N.W.2d, 2013 WL 1629300 (Mich.App.), 80 UCC Rep.Serv.2d 609

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