

UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

IN RE)	
PATRICK McFARLAND,)	CASE NO. 97-50418
Debtor.)	
)	ADV. NO. 97-5192
MARC P. GERTZ, TRUSTEE,)	
Plaintiff,)	CHAPTER 7
v.		JUDGE MARILYN SHEA-STONUM
MEDICAL LIFE INSURANCE		ORDER GRANTING SUMMARY
COMPANY,		JUDGMENT AND SETTING
Defendant.		FURTHER PRE-TRIAL

This matter came before the Court for a pre-trial conference on June 10, 1998. Appearing at the conference were Marc Gertz, Trustee, and Theresa Radwan, counsel for the defendant.

On April 22, 1998, the defendant filed a motion for summary judgment. The issues raised by the Defendant's motion for summary judgment relate to the trustee's first claim for relief - avoidance of an unperfected security interest. The Trustee argues that the Defendant is not a perfected first priority lien holder and the trustee holds a higher priority position. Defendant requests judgment as a matter of law that it does hold first priority pursuant to O.R.C. § 1309.40(A)(UCC 9-403) and the proposition that as between two innocent parties claiming a priority lien on an asset of the debtor, the first to properly file has priority even if such filing is not evidenced in the state records.

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The trustee argues that judgment as a matter of law is inappropriate because the following issues remain undetermined: (1) whether the defendant's financing statement was rejected by the filing office; (2) whether the defendant received a cover letter accompanying the refund check in the amount of \$11.00; (3) whether the \$11.00 refund constituted actual notice to the Defendant of a defect or problem with its financing statement, requiring that it investigate the filing or contact the UCC filing office.

On April 2, 1998, the parties filed a list of stipulations with the Court. Included in that list are the following stipulations:

The debtor assigned his interest in certain commissions from Capitol American Life Insurance Co. on March 5, 1998 to Medical Life to secure the payment of \$150,000 plus interest owed by the debtor to Medical Life. On March 7, 1996, Medical Life filed a financing statement with the Ohio Secretary of State, UCC Division. Upon presentation of the financing statement, Medical Life paid an \$11.00 filing fee. The financing statement filed by Medical Life contains no apparent defects justifying rejection, and Medical Life tendered the proper filing fee to the UCC filing office. The UCC filing office returned a copy of the financing statement to Medical Life, stamped with the identification numbers "AM54894" and "03079611501."

After April 24, 1996, the state issued a check in the amount of \$11.00 to Medical Life. Medical Life's former parent company, Blue Cross/Blue Shield, cashed the check on June 17, 1996. A search of the state UCC records, conducted after the debtor filed a petition for relief, did not reveal the filing of a financing statement.

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At the time these events transpired, the filing office's procedures were as follows:

When a financing statement and filing fee were presented to a clerk for review, if the financing statement was deemed to be insufficient or if the proper filing fee was not tendered, the clerk returned the financing statement and fee to the filing party with an explanation of the deficiency. No label would be generated, nor would a filing number be assigned to the financing statement. However, if the financing statement met all requirements under Ohio law and the filing fee was paid, the clerk accepted the filing for recording.

Upon acceptance, the filing fee was placed in escrow pending completion of the filing. Additionally, a file number and a document number("identification numbers") were assigned to the financing statement and a label indicating those numbers and the date and time of filing was affixed to the financing statement. The original financing statement was then saved to microfilm and returned to the party filing the financing statement along with any copies. If the clerk initially accepted the financing statement for filing, and the financing statement was later determined to be unacceptable, the financing statement was returned to the filing party with a letter explaining the deficiency.

If a filing was not complete within 45 days of tender of the financing statement and creation of the escrow account, either because a defect was not cured or because of an error by the filing office, the filing fee was automatically refunded to the person or entity who submitted the payment. The refund was sent with a cover letter that stated "You either submitted excess funds or a form was rejected and returned to you leaving us with a balance of funds on your

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behalf. This balance is returned to you..." See stipulations 9-13.

The Affidavit of Rick Chircosta, CFO of Medical Life, indicates that Medical Life believed the refund was sent because Medical Life had overpaid the UCC filing office for the filing. The State of Ohio Depository Trust System - Escrow Report and Holding Fund - A/R ledger indicate an initial amount of \$11.00 in escrow on March 7, 1996 and a refund of \$11.00 on April 24, 1996. Exhibit C to the plaintiff's complaint appears to be a receipt from the \$11.00 refund check. The word "***OVERPAYMENT***" appears in the bottom right corner of this exhibit.

LAW

The party moving for summary judgment(Defendant) has the burden of establishing the nonexistence of any "genuine issues of material fact." Bankruptcy Rule 7056; *Searcy v. City of Dayton*, 38 F. 3d 282, 286 (6th Cir. 1994)(*citing Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986)). The Court must resolve all factual disputes, doubts regarding the existence of genuine issues of material fact and inferences that may be drawn from the underlying facts against the moving party(defendant). *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248(1986); *Bachner v. State of Illinois(In re Bachner)*, 165 B.R. 875, 878 (Bankr. N.D. Ill. 1994); *Boyd v. Ford Motor Co.*, 948 F.2d 283, 285 (6th Cir. 1991), *cert. denied* 503 U.S. 939(1992). Summary judgment should be granted if as a matter of law one party must prevail over the other.

O.R.C. § 1309.40(A) provides, "Presentation for filing of a financing statement and tender of the filing fee or acceptance of the statement by the filing officer constitutes filing...." A failure on the part of the filing officer to index an

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otherwise properly executed and filed financing statement is a mistake of the filing officer, not of the secured party. Secured Transactions, 83 OJur 3d §§ 238, and 253 - 258; see *Grabscheid v. Calvert Sales, Inc. (In re Rogers, Inc.)*, 150 B.R. 413 (Bankr. E.D. Mich. 1992) *aff'd* 157 B.R. 600(E.D. Mich. 1993); *Walker v. Tennessee State Bank*, 112 B.R. 913 (Bankr. E.D. Tenn. 1990); see *PA Record Outlet, Inc. V. Mellon Bank, N.A. (In re PA Record Outlet, Inc.)*, 92 B.R. 139 (Bankr. W.D. Penn. 1988). The secured creditor who has filed the financing statement that substantially complies with the statutory requirements and that is not seriously misleading is not penalized for the mistake of the filing officer. *Id.* The parties do not dispute that Medical Life(defendant) presented a financing statement and tendered the filing fee pursuant to O.R.C. § 1309.40. In addition, the parties stipulated that the financing statement contains no apparent defects which would justify its rejection.

However, the trustee contends that the issue of acceptance or rejection of the financing statement remains open for trial. The letter from General Counsel for the Secretary of State indicates that the reason for refunds, overpayment, misplaced filings or a rejected filing, are not noted in the state's database, but "based on her search of the records, it appears the filing in question was not rejected." The filing on its face appears to meet all statutory requirements. Since a labeled copy was generated, it indicates it was accepted for filing. In addition, the parties stipulated that the filing office cannot provide an explanation for why the funds were refunded to Medical Life or whether the financing statement was rejected because at the time in question it was not the practice of the UCC filing office to retain such records. A file stamped copy of a financing

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statement constitutes prima facie evidence of proper filing, and the plaintiff has not presented even a hint of a reason why the financing statement at issue would have been rejected after it was initially accepted. Although the issue of whether the filing was accepted or rejected appears incapable of resolution with absolute certainty, all known and knowable facts and inferences require this issue to be resolved in favor of the defendant.

The trustee argues, assuming the financing statement was accepted and the filing error is not attributable to the defendant, the issue of whether the defendant had notice of the filing error such that the defendant was required to take additional acts to maintain its priority status. This is a question of the priority. In Ohio, priority among conflicting security interests rank according to priority in time of filing or perfection. Priority dates from the time a filing is first made covering the collateral or the time the security interest is first perfected. Perfection of a security interest is complete when attachment occurs and when all applicable steps required for perfection have been taken. O.R.C. § 1309.22. The statute does not provide that the time of filing or perfection is affected by notice of a filing error on the part of the filing office. O.R.C. § 1309.22; see Secured Transactions, 83 OJur 3d § 258.

Therefore, this Court finds that the defendant is the holder of a perfected secured claim, and therefore, grants the defendant summary judgment on the trustee's first claim.

The trustee's complaint contained a second claim for relief pursuant to 11 U.S.C. § 547. On February 9, 1998, the defendant filed an answer denying that claim and asserting various affirmative defenses. These issues were not raised

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at all by the defendant's motion for summary judgment or the plaintiff's response. Thus, the second claim cannot be resolved on the defendant's motion for summary judgment. Therefore, a further pre-trial in this matter shall be held on July 15, 1998 at 2:00 p.m. in Courtroom 250, U.S. Courthouse and Federal Building, 2 S. Main Street, Akron, Ohio. All discovery relating to the second claim shall be completed on or before July 10, 1998.

MARILYN SHEA-STONUM
Bankruptcy Judge

DATED: 6/16/98