

1968

James A. McIntosh, Trustee In Bankruptcy, Estate of
Bountiful Materials & Construction Company,
Inc., B-446-65 v. United States of America :
Respondent's Brief

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IN THE SUPREME COURT OF THE STATE OF UTAH

JAMES A. McINTOSH, Trustee in
Bankruptcy, Estate of BOUNTI-
FUL MATERIALS & CON-
STRUCTION COMPANY, Inc.,
B-446-65,

Plaintiff and Appellant

— vs. —

UNITED STATES OF AMERICA

Defendant and Respondent

RESPONDENT

Appeal from the Judgment of the
Third District Court in and to the
THE HONORABLE STEWARD

FILED

FEB 14 1968

Clerk, Supreme Court, Utah

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B-446-65,

Plaintiff and Appellant,

— vs. —

UNITED STATES OF AMERICA,

Defendant and Respondent.

} Case
No. 11078

RESPONDENT'S BRIEF

STATEMENT OF THE NATURE OF THE CASE

Plaintiff-Trustee's action was to invalidate and oust Defendant's liens, claims, rights and priority, according to its Mortgages of Chattels and its After Acquired Property Agreement, on property seized by and in Plaintiff-Trustee's possession after April 21, 1965. Defendant counterclaimed asserting the validity and priority of its position and security instruments and that Defendant also had a first, paramount and subsisting lien on all the chattel property of the Mortgagor acquired as of, on and after May 20, 1963, being superior to the Plaintiff-Trustee's rights, claims and interests, if any.

DISPOSITION IN THE LOWER COURT

The Lower Court entered a Summary Judgment in favor of Defendant and, among other things, ruled that Defendant's After Acquired Property Agreement and Mortgages of Chattels were prior and valid and that the after-acquired property provisions in the Mortgages and Note were valid and enforceable.

RELIEF SOUGHT ON APPEAL

Plaintiff-Appellant asks that the Summary Judgment of the Lower Court be reversed.

STATEMENT OF FACTS

The facts are fairly stated in Appellant's Brief, however, the following facts should also be stated.

A copy of the Note dated May 20, 1963, is a part of the record before this Court, and the after-acquired property provision is stated on Page 2 of the Note under "Negative Covenants" in Paragraph 1, a part of which is as follows:

"whether now owned or hereafter acquired."

A copy of the May 20, 1963, Chattel Mortgage, Utah Certificate of Title, and Guaranty are parts of the record before this Court.

A copy of the April 5, 1965, Chattel Mortgage is also a part of the record before this Court, and the after-acquired property provisions are on the first page, in part, as follows:

"hereafter acquired by Mortgagor."

POINT I

THE LOWER COURT DID NOT ERR IN HOLDING THAT THE AFTER-ACQUIRED PROPERTY PROVISIONS IN THE NOTE DATED MAY 20, 1963, *CHATTEL MORTGAGE* DATED MAY 20, 1963, THE *AFTER ACQUIRED PROPERTY AGREEMENT* DATED MAY 20, 1963, AND THE *CHATTEL MORTGAGE* DATED APRIL 5, 1965, ARE VALID IN UTAH; AND THAT THE SECURITY INSTRUMENTS OWNED AND HELD BY DEFENDANT CREATED A PRIOR, PARAMOUNT AND SUBSISTING LIEN ON THE CHATTEL PROPERTY SUPERIOR TO ANY ASSERTED INTEREST AND CLAIM OF PLAINTIFF-TRUSTEE.

The Lower Court entered an Order granting Defendant's Motion for Summary Judgment.

SUMMARY JUDGMENT

This case appears to be one of first impression in Utah and came on regularly for hearing before the Court on plaintiff's Motion for Summary Judgment and on defendant's Motion for Summary Judgment. John H. Allen, Esq., appeared for the plaintiff. Walker E. Anderson, Assistant United States Attorney, appeared for the defendant. After arguments and statements by counsel, the case was submitted to the Court. Based upon the pleadings, exhibits in evidence, stipulations and all documents on file and in the interest of justice and the Court being fully advised in the premises finds and concludes that the defendant is entitled to Summary Judgment being entered as a matter of law, and that execution may issue.

The Note, After Acquired Property Agree-

ment, Guaranty, Mortgage of Chattels dated May 20, 1963, Mortgage of Chattels dated April 5, 1965, and the Certificate of Title, being exhibits on file herein, and given to the Government, show the agreement, value and the mortgagor's rights in the chattel property.

The intention of the parties is manifest from the language of the written documents. The intention of the parties, and especially the mortgagor, was to give the defendant a first, valid, prior and subsisting lien on all of the chattel property of the mortgagor acquired as of, on and after May 20, 1963, being superior to the plaintiff's rights, claims and interests, if any.

Plaintiff is estopped to deny and vary the terms of the Chattel Mortgage of May 20, 1963, including therein the after-acquired property provisions and the After Acquired Property Agreement.

Plaintiff has no greater or superior rights as Trustee in Bankruptcy than the mortgagor.

The after-acquired property provisions in the Chattel Mortgage dated May 20, 1963, and the After Acquired Property Agreement dated May 20, 1963, are valid provisions, and these documents are valid, and the documents and the after-acquired property provisions therein created a prior, paramount and subsisting lien on all chattel property acquired by the mortgagor, in favor of the defendant, being superior to any rights, interests and claims of plaintiff, if any.

The Note dated May 20, 1963, mentions "hereafter acquired" property.

The defendant has a valid, prior and subsisting lien on the 1962 Chevrolet Truck.

Plaintiff should hand over to defendant \$2,590.00; and hand over to defendant all unsold chattel property.

The defendant has and had a prior, paramount and subsisting lien on all the mortgagor's chattels before any rights, claims and interests of the Trustee-Plaintiff came into existence. It is, therefore,

ORDERED, ADJUDGED AND DECREED

1. That the Note dated May 20, 1963, is valid.
2. That the After Acquired Property Agreement dated May 20, 1963, is valid and enforceable.
3. That the Mortgage of Chattels dated May 20, 1963, is valid; and the after-acquired property provisions therein are valid; and the Mortgage and after-acquired property provisions therein are enforceable.
4. That the Mortgage of Chattels dated April 5, 1965, is a valid document; and the after-acquired property provisions therein are valid.
5. That the Utah Certificate of Title on the 1962 Chevrolet Truck is valid, and a prior and subsisting lien exists in favor of the defendant; and the defendant's rights thereto are superior to the claims and interests of the Plaintiff-Trustee.
6. That the defendant had and has a first, valid, prior, paramount and subsisting lien on all chattel property of the mortgagor acquired as of, on, or after May 20, 1963, including the property listed herein by virtue of the liens and the after-acquired property provisions in the Mortgage of Chattels and After Acquired Property Agreement executed by the mortgagor, in favor of the defendant, on May 20, 1963.

7. That the defendant had and has a first, valid, prior and subsisting lien on all chattel property superior to any rights, claims and interests of plaintiff.

8. That the plaintiff is estopped to deny and vary the terms of the Note dated May 20, 1963, Mortgage of Chattels dated May 20, 1963, and the After Acquired Property Agreement dated May 20, 1963.

9. That the plaintiff shall hand over to the defendant all money received from the sale of the chattel property, which is \$2,590.00.

10. That the plaintiff shall hand over and surrender possession of the following chattels to the defendant:

Century Water Softener, Model 110-FAPT
Bruner Water Filter, Model AC10AB
Krane Kar
Office Desk, and

all chattels now held or possessed by the plaintiff in this case.

11. Execution may be issued on behalf of the defendant.

DATED this 20th day of October, 1967.

BY THE COURT:

/s/ STEWART M. HANSON, Judge

Bountiful Materials and Construction Company, Inc., about May 20, 1963, procured a loan from the Small Business Administration in the amount of \$25,000.00, for business operation purposes, and gave SBA a Note, Guaranty, Supplemental Mortgage of Chattels and an After Acquired Property Agreement. The Chattel Mortgage was recorded with the Salt Lake County Recorder's

Office on May 27, 1963. The Chattel Mortgage and the Note also contained the usual after-acquired property provisions.

The Mortgagor defaulted. Thereafter, SBA agreed to forbear foreclosing, and the Mortgagor executed and gave to SBA a Mortgage of Chattels dated April 5, 1965, and a Utah Certificate of Title on a 1962 Chevrolet Truck. The Chattel Mortgage was recorded with the Salt Lake County Recorder's Office on April 5, 1965, and was filed with the Utah State Tax Commission on April 23, 1965. Sixteen days after April 5, 1965, without knowledge or notice to SBA, the Mortgagor filed in Federal Court in Bankruptcy on April 21, 1965, B-446-65; James A. McIntosh was appointed Trustee; and the Mortgagor ceased operations of business. The Trustee Disclaimed and the Referee executed an Order Authorizing Disclaimer as to all chattels identified in the SBA Chattel Mortgage dated May 20, 1963.

After his appointment, the Trustee *seized* and took possession of all the chattels identified in the SBA Mortgage of Chattels dated April 5, 1965, to the exclusion of all the world. He asserted and maintained whole and total ownership of these chattels. The chattels are identified on Page 2 of Appellant's Brief.

Until January 1, 1966, when Utah adopted the Uniform Commercial Code, Utah UCC Title 70A, see 70A-9-108 and 70A-9-204, the Utah Code was apparently *silent* with regards to the after-acquired property clauses. Also, see the discussion in UCC 1962 Official Text, Pages 629-

630 and 642-646. The *Utah Supreme Court* apparently has been *silent* on the question of after-acquired property clauses.

The States of California, Oklahoma and Washington have declared that an after-acquired property clause in a chattel mortgage is valid, *Oliver v. Electrical*, 367 P. 2d 618. Also, Utah's sister State, Idaho, in *Diamond National Corporation v. Lee*, 333 F. 2d 517 recognizes the rule that after-acquired property clauses in chattel mortgages are valid by *statute*, Section 45-107, and *decisional law* in Idaho. As announced by the Idaho Supreme Court in *Poage v. Co-Operative Pub. Co. et al.*, 66 P. 2d 1119, it seems perfectly clear that the parties *intended* that the trust mortgage should cover not only the property then owned by the Publishing Company but all personal property which it might *thereafter acquire* and that it is sufficient where, as here, the *intention* of the parties, that *after-acquired property* should be covered by the mortgage and held as security for the debt, is *manifest from the language of the instrument*.

It appearing that the *Utah Supreme Court* being silent as to after-acquired property clauses, this Court should follow the United States Supreme Court as announced by that Court in the *Ecker* and *Wade* cases.

In *Wade v. Chicago, Springfield, and St. Louis Railroad Company, et al.*, 149 U. S. 327, the Court states on Page 341:

“The ‘after-acquired clause’ in the mortgage of the Chicago, Springfield and St. Louis Railroad Company, under the decisions of this court, covers

all acquisitions made to that property by either the construction company or others acquiring rights under it. *Dunham v. Cincinnati, Peru &c. Railway Co.*, 1 Wall. 254; *Galveston Railroad v. Cowdrey*, 11 Wall. 459; *Porter v. Bessemer Steel Co.*, 122 U.S. 267; *Toledo &c. Railroad v. Hamilton*, 134 U.S. 296; *Central Trust Co. v. Kneeland*, 138 U.S. 414. In this latter case it was held that the 'after-acquired property clause' of a mortgage will cover not only legal acquisitions, but all equitable rights and interests subsequently acquired by or for the mortgagor."

The *Wade* case held that the appellants' prior lien cannot be cut off or displaced and that the appellants' prior lien is a clear and undoubted priority over a later mortgage and that the Circuit Court erred in not allowing appellants the full amount of their bonds and in not declaring said bonds a lien upon the *entire* line of the railroad.

SBA is entitled to exercise its legal and equitable rights under the after-acquired property clause and Agreement of 1963 to sell the chattels identified in the 1965 Chattel Mortgage *or* to receive all the proceeds from the sale of the property. Just because the Debtor-Mortgagor filed in Bankruptcy, neither the Bankruptcy Act nor the Bankruptcy Court can elevate the Trustee in Bankruptcy to a priority position over SBA's priority lien position with regards to all the chattels described in the Supplemental Mortgage of Chattels of April 5, 1965.

The United States Supreme Court in the 67 page case of *Ecker et al. v. Western Pacific Railroad Corpo-*

ration, et al., 318 U. S. 448, leaves no room for doubt but that SBA has a first, prior and secured lien and can foreclose upon all of the chattels itemized in the Mortgage of Chattels dated April 5, 1965, because of the after-acquired property clause in SBA's Mortgage of Chattels dated May 20, 1963, and Agreement, or receive the proceeds from the sale by the Trustee. In the *Ecker* case the question was whether the property is within the terms of the first Mortgage and the Court answered affirmatively because of the *after-acquired property* clause in the first Mortgage. In the *Ecker* case, ICC held that the first Mortgage was senior to the refunding Mortgage and should be considered to be a first lien on three classes of property; i.e., (1) after-acquired rolling stock and equipment acquired under equipment trusts and leases; (2) the debtor's interests in an after-acquired branch railroad line; and (3) the debtor's title to certain non-carrier reality; the District Court adopted the ICC ruling; the Ninth Circuit reversed on appeal but did not pass on the after-acquired property claim issue. The Supreme Court affirmed the District Court's conclusions adopting the ICC's determinations as to the priority of the first Mortgage. The *Ecker* case was followed in *Bankers Trust Company, et al. v. Calloway, et al.*, 148 F. 2d 631 (5th CA).

The present case is similar in many respects to the case of *Riverview State Bank v. Ernest*, 198 F. 2d 876, Tenth Circuit 1952, Rehearing Denied in 1952, Cert. Denied, 344 U. S. 892. In that case the mortgagor gave the original Note and Mortgage and later gave Supplemental

Mortgages of Chattels. After default, a petition in involuntary Bankruptcy was filed against the Bankrupt and an Order of Adjudication was entered; and a Trustee was duly selected and qualified. The Supplemental Mortgages had been recorded. The Tenth Circuit, among other things, stated that the rights of the Bank were prior and superior to those of a garnisheeing creditor and therefore its rights were prior and paramount to those of the Trustee in Bankruptcy, and the Tenth Circuit stated further,

“While the question is not free from doubt, we think it is fairly clear that a mortgage covering an oil and gas leasehold in Kansas which is recorded in the mortgage records of the county wherein the property is situated but not filed and entered upon the chattel mortgage records fixes and fastens a lien upon the property effective from the date of the filing and recording of the mortgage as against a subsequently appointed trustee in bankruptcy.”

In re *George Varratos*, 159 F. Supp. 730, the Trial Court discussed Section 70, sub. c. of the Bankruptcy Act (11 U.S.C.A. Section 110) and stated that,

“If the mortgages are valid liens, having been filed on time, it would appear that the Trustee has no rights whatsoever despite Section 70-c since he would be only in the position of a creditor that came into existence and even if such a creditor might have existed he would have no rights if the mortgages were filed within a reasonable time.”

The Order for the Trial Court was affirmed, 259 F. 2d 920.

In *Robert W. Matthews, as Trustee in Bankruptcy of Beard & Company, Inc., Plaintiff-Appellant, v. James Talcott, Inc., Defendant-Appellee*, 345 F. 2d 374, the *Seventh Circuit* affirmed the entire Judgment by the District Court, and Cert. was denied, 382 U. S. 837. A part of this case is recorded as follows:

“Five issues were presented to the district court for decision: (1) whether designations of lumber inventory made within four months prior to bankruptcy were voidable preferences under section 60 of the Bankruptcy Act, 11 U. S. C. Section 96; (2) whether the bankrupt’s inventory of wood mouldings was subject to the factor’s lien; (3) whether warehouse receipts held by Talcott covering lumber deposited in a field warehouse located on the bankrupt’s premises were valid; (4) whether accounts receivable assigned by the bankrupt to Talcott within ten days of bankruptcy and growing out of sale of lumber covered by the factor’s lien constituted voidable preferences; and (5) whether a chattel mortgage held by Talcott covered leasehold improvements and other items of equipment.

“The district court entered findings of fact and conclusions of law, deciding in favor of Talcott on all issues. From the judgment this appeal was taken.

* * * *

“The mortgage listed specific property identified as being located at the premises of the bankrupt. In addition to the specific listing of properties subject to the mortgage, the mortgage contained a blanket clause ‘including all small tools, dies, and all other goods and chattels of every description and kind.’ The instrument also covered ‘all stock, fixtures, tools, dies, jigs, goods, wares, merchandise and other chattels * * * now situated on

the said premises or which may be hereafter acquired by and placed on the said premises by the mortgagor at any time hereafter, together with all other goods and chattels of the mortgagor.'

"The items the trustee now challenges as not specifically listed in the chattel mortgage were certain leasehold improvements, an automobile, a truck, an electric motor, an off-set press, a copying machine, and a radio music system. The district court, however, found that all of these items were covered by the blanket clause and concluded therefrom that the proceeds from their sale belonged to Talcott. Although the more desirable procedure would be to describe with greater specificity the property subject to a chattel mortgage, the blanket clause here covering all property at a specified location was sufficient to subject that property to the terms of the mortgage."

The Mortgagor in this case intended to and did secure SBA for the loan and SBA properly recorded its Mortgages. The Lower Court has decreed that the after-acquired property clauses are valid and enforceable.

The Government requests this Court to affirm the Summary Judgment.

POINT II

THE LOWER COURT DID NOT ERR IN HOLDING THAT THE LIEN, ON THE 1962 CHEVROLET TRUCK, WAS VALID IN VIEW OF THE FACT THAT A COPY OF THE CHATTEL MORTGAGE OF APRIL 5, 1965, WAS FILED WITH THE UTAH STATE TAX COMMISSION 2 DAYS AFTER THE MORTGAGOR PETITIONED IN BANKRUPTCY.

Plaintiff-Trustee places great stress and emphasis upon Sections 41-1-80-87 Utah Code Annotated. However, these Sections do not require or demand a footrace of SBA in filing its April 5, 1965, Chattel Mortgage with the Utah State Tax Commission. This Mortgage was reasonably and seasonably filed by SBA with the Salt Lake County Recorder's Office on April 5, 1965, and thereafter filed on April 23, 1965, with the Tax Commission. It took a few days for the Salt Lake County Recorder's Office to record the Mortgage. SBA had no knowledge or notice that the Mortgagor would plunge and thrust itself into Bankruptcy on April 21, 1965, just 16 days after SBA received this Mortgage.

The lien of SBA on the 1962 Chevrolet Truck is valid. Justice and equity require that the Summary Judgment be affirmed.

The Government maintains that the 1963 Chattel Mortgage and the After Acquired Property Agreement are valid liens on the 1962 Chevrolet Truck identified in the 1965 Mortgage and that the Government is entitled to the Truck or the proceeds therefrom. Both Mortgages were properly filed and recorded with the Salt Lake County Recorder's Office before Bankruptcy filing on April 21, 1965; also, the Utah Certificate of Title shows on its face that SBA is the mortgagee. In *Emery v. Union Inv. Co.*, In re Cotter, 212 F. 2d 183, before the Sixth Circuit, the appeal involved the validity of a Chattel Mortgage which secured a Note given for the purchase of a motor vehicle prior to Bankruptcy. The dispute arises between the *Trustee* and *Mortgagee*. The Court, among other things, stated that the Chattel Mortgages remained undischarged of record, and,

“In a well-reasoned opinion, the District Court decided:

‘In the absence of the facts and circumstances to manifest a contrary intention of the parties, the taking of a new note for one secured by a (chat-tel) mortgage is not payment, does not extinguish the debt evidenced thereby, and does not discharge the (chattel mortgage) security for the earlier note. The mortgage secures the debt, of which the note is mere evidence. A change of the evidence of an indebtedness neither discharges the obligation nor releases the security which follows the debt.’ (113 F. Supp. 860.)”

POINT III

THE LOWER COURT DID NOT ERR IN HOLDING THAT PLAINTIFF IS ESTOPPED TO DENY AND VARY THE TERMS OF THE CHATTEL MORTGAGE DATED MAY 20, 1963, AND THE AFTER ACQUIRED PROPERTY AGREEMENT, AND SBA’S SECURED PRIORITY POSITION.

When the Trustee was appointed after April 21, 1965, he *seized* all the chattels described in the SBA April 5, 1965, Chattel Mortgage and maintained *total ownership* to the exclusion of SBA. This seizure and claimed ownership wholly ignored SBA’s documents and the after-acquired property provisions in the documents held and owned by SBA. This seizure and claimed ownership wholly denied to SBA its rights and security as described in its documents. This seizure and claimed ownership by the Trustee totally varied and destroyed the effect of SBA’s documents and the terms therein.

The Plaintiff-Trustee had knowledge and notice of SBA's recorded Mortgages and the after-acquired property provisions therein. The Circuit Court in *Stockyards Loan Company v. Nichols*, 243 F. Rep. 511, recognized along with the Supreme Court of Oklahoma the Mortgagee's legal lien upon such after acquired property.

"It is still the rule that estoppels should be resorted to solely as a means of preventing injustice * * *"; 28 Am. Jur. 2d 601.

The Lower Court stayed and stopped the mighty hand of the Trustee, a hypothetical creditor, by its Summary Judgment in favor of the Defendant and the Summary Judgment should be affirmed, thereby following the Tenth Circuit. See also *United States v. Evans*, 245 F. 2d 681 (N.M.); and *United States v. Cassidy Commission Co.*, 263 F. Supp. 1019 (Okla.), as affirmed by the Tenth Circuit in the September Term, 1967, No. 9511.

CONCLUSION

Defendant respectfully suggests that the Summary Judgment be affirmed.

Respectfully submitted,

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