

**CFB-5, INC. v. CUNNINGHAM**  
**371 B.R. 175 (N.D. Tex. 2007)**

***MEMORANDUM OPINION AND ORDER***

SOLIS, District Judge.

This is an appeal from two final orders of the United States Bankruptcy Court for the Northern District of Texas.... After reviewing the record, the parties' briefs, and the applicable law, this Court hereby AFFIRMS the orders of the Bankruptcy Court.

**I. Factual and Procedural Background**

The cause of action underlying this appeal is a petition in bankruptcy against Vernon Hulme. The original bankruptcy petition was filed as an involuntary action by Appellant against Hulme in October 2004. It was converted to a Chapter 7 proceeding in December 2004, and Appellee was appointed as Chapter 7 Trustee. After investigation, Appellee determined that the only assets that could be used to create an estate from which creditors could be paid was a collection of paintings listed in Debtor's Personal Property Schedule. Some of these paintings were in the possession of Greg Cunningham, president of Appellant corporation, when the bankruptcy petition was filed. In September 2005, Appellee asked the Bankruptcy Court to order the turnover of all artwork described in Debtor's Chapter 7 filing, and in December 2005, the court ordered Cunningham and any company under his control, including Appellant, to surrender 162 paintings to Appellee. Appellee was able to recover nineteen paintings, and he arranged with Surf City to store them until they could be sold.

A dispute over the ownership of at least three of the nineteen paintings ("the Holland paintings") is the focus of the present appeal. Appellant has claimed an ownership interest, a purchase money security interest, a partnership interest, and a possessory lien in the paintings from the outset of the bankruptcy proceedings. Surf City claimed a security interest in the paintings on the basis of a promissory note executed by Debtor in favor of Surf City in 2002, secured by Debtor's pledge of personal assets including "50% interest in art collection." Debtor acknowledges borrowing the money from Cunningham to purchase the Holland paintings and claims that they are the property of a partnership that existed at one time between Debtor and Cunningham. Debtor claims the other sixteen paintings as personal property. Appellee has treated all nineteen paintings as property of the bankruptcy estate.

In August 2006, Appellee objected to Appellant's claim of a security interest in the artwork, filed in March 2005, on the ground that the claim was unsupported by documentation. In September 2006, Appellant filed a response claiming that its interest was secured by possession and by the doctrines of equitable lien and constructive trust. On September 20, 2006, after a hearing, the Bankruptcy Court issued the first order appealed from, the "Order Sustaining Trustee's Objections to Claim of Interest in Artwork." The court held that Appellant has no security interest, no ownership interest, and no equitable lien in any of the paintings. At the

hearing, the Bankruptcy Court noted that it found Debtor's testimony "credible" and "persuasive" on the subject of ownership of the artwork.

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### III. Analysis

#### A. Does Plaintiff Have Any Interest in Paintings?

Appellant claims a purchase money security interest in the Holland paintings. A "security interest" is a "purchase money security interest" if the party holding the security interest gave value to the debtor that enabled the debtor to acquire the collateral. TEX. BUS. & COM. CODE ANN. §§ 9.103(a)(1) & 9.103(b)(1) (Vernon 2001). In the present case, the "purchase money" element is satisfied; there is no question that Cunningham gave value to Debtor that enabled Debtor to acquire the Holland paintings. However, the mere loan of the purchase money does not create a "security interest." In order for a security interest to attach, three elements are required: (1) the debtor must have rights in the collateral sufficient to permit attachment of the security interest; (2) the secured party must give value in exchange for the security interest; and (3) the agreement must be satisfactorily evidenced. *Id.* § 9.203(b)(1)-(3). Under the version of Uniform Commercial Code in effect in Texas from July 1, 2002, to August 31, 2005, this third element could be satisfied if the secured party took possession of the collateral "pursuant to the debtor's security agreement." *Id.* § 9.203(b)(3)(A)-(D).

The record is clear that Debtor never executed a security agreement to Appellant or to Cunningham, either for the Holland paintings or for any other paintings in Debtor's estate. Appellant acknowledges that it has no written security agreement with Debtor, and relies on "its possessory security interest ... pursuant to Tex. Bus. & Com. Code § 9.313" and its "equitable lien and constructive trust pursuant to ... [*Bombardier Aerospace Employee Welfare Benefits Plan v. Ferrer, Poirot & Wansbrough*], 354 F.3d 348 (5th Cir. 2003)." However, Tex. Bus. & Com. Code § 9.313 permits a secured party to *perfect* a security interest in goods by taking possession of the collateral; this provision does not speak to the *creation* of a security interest by such a method. TEX. BUS. & COM. CODE ANN. § 9.313(a). Further, *Bombardier* stands for the proposition that a company may impose an equitable lien or a constructive trust to enforce the express terms of a written contract when there is no remedy at law, a situation that does not arise in the present case. *Bombardier Aerospace Employee Welfare Benefits Plan*, 354 F.3d at 351, 362. Thus the Court finds that the Bankruptcy Court was correct in ruling that Appellant has no security interest in the artwork.

Appellant's claim of an ownership interest in the Holland paintings is based on Appellant's having purchased them; it also claims an ownership interest on the basis of having been in possession of them at the time the bankruptcy petition was filed. The record is clear that Appellant did not actually purchase the Holland paintings; rather, Cunningham paid for the paintings on behalf of Debtor and recorded the purchase price as a loan from himself to Debtor. Also, in the absence of a security agreement from Debtor, possession did not secure ownership in the paintings. TEX. BUS. & COM. CODE ANN. § 9.313(a). This Court thus finds that the Bankruptcy Court did not err in holding that Appellant has no ownership interest in the artwork.

Appellant's claim of a partnership interest in the Holland paintings is based on his having purchased them on behalf of what Debtor characterized as a "loosely framed partnership" between himself and Greg Cunningham. However, since Cunningham consistently denied the existence of such a partnership, and there was never a partnership between Debtor and Appellant, this is a difficult claim to sustain. Further, the record of Cunningham's personal loans to Debtor for the purchase of the paintings was the basis for the Bankruptcy Court's finding that Appellant has no security interest in the paintings. Because the Bankruptcy Court made no finding on the issue of partnership interest in either of the orders appealed from, this Court does not reach this issue.

Lastly, Appellant claims an equitable possessory lien on the Holland paintings. An equitable possessory lien arises when parties agree that one party will hold certain specified property as collateral for a debt owed by the other. *In re Daves*, 770 F.2d 1363, 1367 (5th Cir. 1985). To create an equitable lien, there must be (1) an express or implied agreement between the parties demonstrating a clear intent to create a security agreement; and (2) the identification of specific property intended to secure the payment. *Id.* at 1363; *In re "RONFIN" Series C Bonds Sec. Interest Litig.*, 182 F.3d 366, 371 (5th Cir. 1999). If there is no security agreement, there can be no equitable possessory lien. *Daves*, 770 F.2d at 1367.

Appellant claimed that the paintings were given to him by Debtor and by Debtor's estranged wife with the understanding that they would be security for an outstanding debt between Debtor and Cunningham. Debtor testified that the Holland paintings were purchased with a loan from Cunningham as part of a partnership between them, and that there was never an agreement, express or implied, for Cunningham to hold either the Holland paintings or any other artwork as security for a debt. The Bankruptcy Court, in finding that Appellant had no possessory interest in the paintings, did not reach the issue of whether there might be an outstanding debt between Debtor and Cunningham. Further, the court stated that it found Debtor's testimony "credible and persuasive." For these reasons, this Court finds that the Bankruptcy Court properly held that Appellant has no possessory lien on the artwork.

For the foregoing reasons, this Court agrees with the Bankruptcy Court that Appellant has no security interest, no ownership interest, and no equitable possessory lien on any of the artwork in Debtor's estate....

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