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ENTERED JUL 26 2007
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CLERK, U.S. BANKRUPTCY COURT
SOUTHERN DISTRICT OF CALIFORNIA
BY _____ DEPUTY

NOT FOR PUBLICATION

UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF CALIFORNIA

In re
RM&M PRACTICE MANAGEMENT, INC.,
Debtor.

Bankruptcy No. 04-05051-M7
Adversary No. 06-90300-M7

LESLIE T. GLADSTONE, Chapter 7
Trustee,
Plaintiff,
v.

MEMORANDUM DECISION REGARDING
FINANCE UNLIMITED'S MOTION FOR
SUMMARY JUDGMENT

FIRST PACIFIC CORP., an Oregon
Corporation, FINANCE UNLIMITED,
LLC, a California limited
liability company, et al,
Defendants.

FINANCE UNLIMITED, LLC, a
California limited liability
company,
Cross-Complainant,

v.
FIRST PACIFIC CORP., an Oregon
Corporation,
Cross-Defendant.

I

BACKGROUND

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4 The Chapter 7 Trustee filed this complaint for a judicial
5 determination of the respective rights of the estate and the
6 defendants to the accounts receivables ("Accounts") of RM&M Practice
7 Management ("Debtor") and Manji & Mendivil P.C. ("PC"). The Trustee
8 contends that the receivable financing agreement First Pacific
9 Corporation ("First Pacific") entered with the Debtor and the PC was
10 a loan, not a sale agreement. First Pacific never filed a UCC-1
11 financing statement to perfect its security interest. After her
12 appointment, the Trustee demanded First Pacific turn over the accounts
13 and/or their proceeds. First Pacific refused and continued to collect
14 the accounts post petition.

15 The Trustee seeks a declaration that the agreement was a loan,
16 as well as recovery of the amount First Pacific collected from the
17 Accounts. She seeks recovery on several theories, including
18 preferential transfers, fraudulent conveyance, postpetition transfer,
19 breach of contract, conversion and money had and received. She also
20 seeks contempt damages for willful violation of the automatic stay and
21 punitive damages for conversion. Finance Unlimited ("Finance") was
22 included as a defendant because it claims to have a first priority
23 security interest in the Accounts.¹

24 The Trustee and Finance reached an agreement concerning the
25 application of any recovery from First Pacific. Finance filed a
26

27 ¹ Finance obtained an interest in the Accounts through an assignment from Matsco on or about
28 September 30, 2004.

1 cross-complaint against First Pacific seeking damages for conversion,
2 unjust enrichment, money had and received, or claim and delivery.
3 Finance filed a motion for summary judgment on the cross-complaint
4 ("Motion"), which was heard on February 14, 2007 and taken under
5 submission. At the last status conference on June 22, 2007, the
6 parties reported that their latest mediation attempt was not
7 successful, but another settlement offer was outstanding. The parties
8 reported that the matter would not settle during the week of July 2,
9 2007, so the Court now issues this decision on the Motion. For the
10 following reasons, this Court has determined that while summary
11 adjudication of some issues is appropriate, there remain genuine
12 issues of material fact as to other matters, and the Motion cannot be
13 granted in full.

14
15 **II**

16 **FACTS**

17
18 Between October 12, 2001 and October 15, 2001, the Debtor
19 entered Management Service Agreements ("MSA") with Drs. Manji &
20 Mendivil and the PC for their dental practices in Tierrasanta. In a
21 nutshell, the lengthy MSAs provide the PC will supply the dentists and
22 other professionals and the Debtor would operate the rest of the
23 business, including owning the inventory and equipment and providing
24 staffing, billing and office space. The Accounts generated by the PC
25 and collected by the Debtor were to be split 70% to the Debtor, and
26 30% to the PC.

27 On October 15, 2001 Matsco loaned \$650,000 to the Debtor and the
28 PC to purchase the Tierrasanta practices. The loan documents show

1 both the Debtor and the PC as borrowers, and the debt was guaranteed
2 by Dr. Manji, Dr. Mendivil and Mr. Ramo. The Debtor and the PC each
3 granted a security interest to Matsco in all property - including the
4 Accounts. On or about October 19, 2001, Matsco filed UCC-1 Financing
5 Statements with the secretary of state, perfecting the lien against
6 the interests of the Debtor and the PC in the Accounts. Matsco's
7 interest in the loan and collateral was assigned to United on
8 September 30, 2004.

9 On January 27, 2004 First Pacific entered an agreement with the
10 PC, the Debtor, the individual doctors and the other related parties
11 titled "Sales and Service Agreement" ("First Pacific Agreement"). The
12 First Pacific Agreement is basically a factoring agreement, with the
13 addition of a fee to First Pacific for setting up an account system
14 for the Debtor and the PC. Matsco was not provided notice of this
15 arrangement, and First Pacific did not file a UCC-1 Financing
16 Statement.

17 First Pacific has collected approximately \$305,000 of the
18 Accounts since February 2004. The PC and the Debtor defaulted on the
19 debt to Matsco some time in April 2004. The Debtor and related
20 entities RNN and Ramo Practice Management filed Chapter 11 on June 4,
21 2004. The PC did not file for bankruptcy protection. Various cash
22 collateral orders were entered during this case acknowledging
23 Matsco/Finance's interest in the Accounts, and providing them with
24 adequate protection for the use of cash collateral. Leslie Gladstone
25 was appointed Chapter 11 Trustee in this case on June 29, 2004.
26 During July 2004, her attorneys sent letters to First Pacific
27 demanding that it stop collecting the accounts. Matsco did not make
28 a demand to First Pacific as to the accounts for fear of violating the

1 automatic stay. Due at least in part to First Pacific's collection
2 and retention of the Accounts, the case was quickly converted to
3 Chapter 7 and the assets sold.

4
5 III
6 DISCUSSION

7 **A. Jurisdiction**

8 First Pacific questions the jurisdiction of this Court to
9 determine the issues raised by the Motion. In general, it is not the
10 bailiwick of the bankruptcy court to resolve disputes between two
11 creditors as to property that is not part of the estate. However, in
12 this case it is not appropriate to abstain. From the beginning of the
13 Chapter 11, the fact that the assets of the Debtor, the PC and other
14 related entities were so intertwined has created issues and confusion
15 and have been the subject of numerous hearings and orders. The MSA
16 between the Debtor and PC provides the Debtor with an interest in the
17 Accounts. This interest passed to the estate. A determination of the
18 respective rights of the parties to the Accounts is a core proceeding
19 under 28 U.S.C. §157(b)(2)(K), supporting a finding of jurisdiction
20 in this Court.

21
22 **B. First Pacific Agreement as Sale or Loan**

23 In connection with the Motion, the parties supplied copies of the
24 relevant agreements, financing statements, accountings and deposition
25 transcripts. Finance contends that it has a superior interest in the
26 Accounts to First Pacific. Finance makes two alternative arguments
27 to support this contention. Either the First Pacific Agreement was
28 a loan without a perfected security interest rather than a sale of

1 accounts; or even if it was a sale of accounts, the sale was subject
2 to Finance's prior perfected security interest. Finance is correct
3 on both arguments, and First Pacific has not raised any genuine issue
4 of material fact in opposition.

5 All First Pacific has provided to refute the documents in the
6 record are vague allegations questioning the validity of Finance's
7 security interest, the transfer from Matsco to Finance, and the term
8 "sale" in First Pacific's Agreement. For years, courts have echoed
9 the same refrain: calling something a sale does not make it so; a
10 label does not change the true nature of the transaction. The
11 distinction between a loan and a sale is determined from the facts and
12 circumstances surrounding the transaction based on the intent of the
13 parties. Cases discussing the factors to consider include In re
14 Commercial Money Center, 350 B.R. 465, 483-484 (9th Cir. BAP 2006);
15 Golden Plan of California, Inc., 829 F.2d 705, 709 (9th Cir. 1987); In
16 re Woodson, 813 F.2d 266, 272 (9th Cir. 1987); and Milana v. Credit
17 Discount Co., 27 Cal.2d. 335,339(1945).

18 The factors present in the First Pacific Agreement which
19 establish that this was a loan rather than a sale are:

20 - the seller (Debtor and the PC) is required to repurchase the
21 Accounts if they are not paid within a certain amount of time;

22 - the buyer (First Pacific) has recourse against the seller (PC
23 and Debtor);

24 - First Pacific charged loan fees in connection with the
25 transaction;

26 - First Pacific may reassign the accounts it considers
27 uncollectible;

28 - the risk of loss is on the seller (PC and Debtor) not First

1 Pacific;

2 - First Pacific has remedies similar to a lender.

3 These provisions lead to the conclusion that the First Pacific
4 Agreement is a financing arrangement rather than a sale of the
5 Accounts.

6

7 **C. Priority of Finance/Matsco's Lien**

8 First Pacific claims there are genuine issues of fact concerning
9 the validity of Finance's security interest. However, a review of the
10 documents provided establish that both the Debtor and PC (as well as
11 the guarantors) granted Matsco/Finance a security interest in the
12 Accounts as part of the collateral to purchase the dental practices.
13 Matsco perfected the security interest years before First Pacific
14 entered its financing agreement with these parties. While First
15 Pacific objects to the legal conclusions contained in the declarations
16 submitted by Finance, First Pacific points to no flaw in the security
17 agreements and financing statements which are in the record. Without
18 relying on the opinion testimony in the declarations, the Court
19 reaches the conclusion that Matsco properly perfected its security
20 interest in the Accounts in October 2001, and that the transfer to
21 Finance and continued perfection were also proper.

22 First Pacific argues that the Debtor and PC made representations
23 and warranties in the First Pacific Agreement that none of the
24 Accounts "has or will be pledged to any other party." However, Mr.
25 Ketsdever also admitted that First Pacific would have conducted a UCC
26 search of the clients, which included the PC and the Debtor. The
27 prior perfected interest of Matsco was of record and it would be
28 unreasonable for First Pacific to ignore that interest in reliance on

1 the boilerplate representations and warranties contained in the First
2 Pacific Agreement to the detriment of the prior perfected secured
3 creditor.

4 So, even if the First Pacific Agreement were a sale of accounts
5 rather than a loan, First Pacific would take the Accounts subject to
6 Finance's prior perfected security interest.

7
8 **D. Genuine Issues of Material Fact Remain**

9 In either the case of an unperfected financing agreement or a
10 sale of the accounts, Finance claims to have rights to the Accounts
11 based on the liens created and perfected in October 2001, and contends
12 that the unauthorized transfer of the collateral was a conversion,
13 citing to In re Thiara, 285 B.R. 420, 427 (9th Cir. BAP 2002).
14 Finance seeks damages based on the value of the property plus interest
15 based on Cal.Civ.Code § 3336. Finance urges alternative theories of
16 unjust enrichment, money had and received, or claim and delivery based
17 on the same evidence. First Pacific correctly notes that genuine
18 issues of material fact remain before judgment can be awarded on these
19 claims.

20 The record in this case is not sufficiently clear as to when
21 Matsco or Finance was entitled to possession of the Accounts, the
22 extent to which Matsco gave implied authorization for the use of the
23 Accounts, whether there was any collusion between the Debtor, PC and
24 First Pacific, and the amount of damages associated with any
25 conversion or unjust enrichment. As long as the Debtor and PC were
26 in compliance with the Matsco Agreement, they were allowed to use the
27 proceeds of the Accounts. The record contains evidence that First
28 Pacific provided funding to the Debtor and PC. There are various

1 requirements for tracing proceeds and protections provided to good
2 faith purchasers and junior lenders in Ca. Coml. Code §§ 9315, 9331
3 and 9332. The record is not adequate to support summary judgment on
4 these issues.

5
6 IV

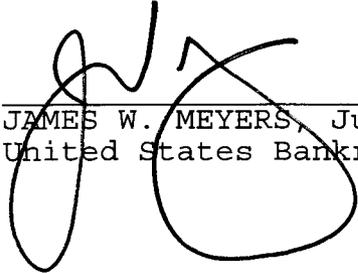
7 CONCLUSION

8 This Court has jurisdiction to determine the validity, priority
9 and extent of the liens and interests in the Accounts. Summary
10 adjudication is appropriate to determine that the First Pacific
11 Agreement was a financing arrangement with an unperfected security
12 interest rather than a sale of the Accounts and that Matsco/Finance
13 had a prior properly perfected security interest in the Accounts.

14 Genuine issues of material fact remain on other issues, so
15 summary judgment is not appropriate on this record.

16 The Court will enter a separate order on this same date.

17 Dated: JUL 26 2007

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21 JAMES W. MEYERS, Judge
22 United States Bankruptcy Court
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