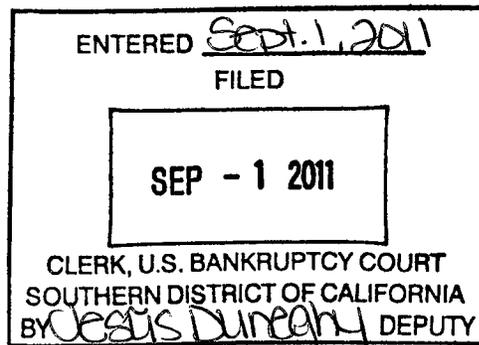


1 **WRITTEN DECISION - NOT FOR PUBLICATION**



8 UNITED STATES BANKRUPTCY COURT

9 SOUTHERN DISTRICT OF CALIFORNIA

10

11 In re) Case No. 11-07388-PB11

12 PREMIER GOLF PROPERTIES, LP,) ORDER ON MOTION TO PROHIBIT

13 Debtor.) USE OF CASH COLLATERAL

14 _____)

15 Debtor's main cash-generating activity at present is the

16 operation of two 18-hole golf courses, as well as an associated

17 driving range. The primary secured creditor, Far East National

18 Bank seeks an order prohibiting debtor from using its purported

19 cash collateral in the form of daily greens fees and driving

20 range fees.

21 The Court has subject matter jurisdiction over the

22 proceeding pursuant to 28 U.S.C. § 1334 and General Order

23 No. 312-D of the United States District Court for the Southern

24 District of California. This is a core proceeding under

25 28 U.S.C. § 157(b)(2)(M).

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1 Debtor borrowed \$11,500,000 from Far East. As collateral
2 for the loan, debtor executed a deed of trust, a security
3 agreement, and an assignment of leases and rents. In paragraph H
4 of the trust deed recitals, debtor granted to Far East
5 "Borrower's interest in all of the following described property
6 and all proceeds thereof":

7 H. All accounts . . . , including without
8 limitation . . . all revenues, receipts,
9 income, accounts receivable and other
10 receivables, including without limitation
license fees, golf club and membership
initiation fees, green fees, driving range
fees

11 Debtor also provided Far East with a UCC Financing Statement with
12 comparable recitals, which was duly recorded with the California
13 Secretary of State. For purposes of the present discussion the
14 Court presumes that Far East has a valid, perfected security
15 interest in all the identified collateral of Premier Golf under
16 California law. The issue before the Court at the present time
17 is the effect, if any, of 11 U.S.C. § 552 on Far East's security
18 interests.

19 Section 552(a) of Title 11, United States Code, provides:

20 (a) Except as provided in subsection (b) of
21 this section, property acquired by the estate
22 or by the debtor after the commencement of
23 the case is not subject to any lien resulting
from any security agreement entered into by
the debtor before the commencement of the
case.

24 As § 552(a) makes express, § 552(b) sets out the exception to the
25 foregoing. It states:

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1 (b) (1) . . . [I]f the debtor and an entity
2 entered into a security agreement before the
3 commencement of the case and if the security
4 interest created by such security agreement
5 extends to property of the debtor acquired
6 before the commencement of the case and to
7 proceeds, products, offspring, or profits of
8 such property, then such security interest
9 extends to such proceeds, products,
10 offspring, or profits acquired by the estate
11 after the commencement of the case to the
12 extent provided by such security agreement
13 and by applicable nonbankruptcy law . . .

8 Subpart (b) (2) was added in 1994 to recognize the security
9 interests of "hotel financiers", and is not directly at issue in
10 this proceeding.

11 In In re Bering Trader, Inc., 944 F.2d 500 (8th Cir. 1991),
12 the court briefly explained:

13 Section 552(a) states the general rule
14 that a prepetition security interest does not
15 extend to property acquired by the estate
16 after the filing of the petition. Section
17 552(b) provides an exception for some
18 proceeds, products, offspring, rents or
19 profits of encumbered property.

17 944 F.2d at 501. The court then looked at the purpose of
18 § 552(a):

19 Section 552(a) is intended to allow a debtor
20 to gather into the estate as much money as
21 possible to satisfy the claims of all
22 creditors. [Citations omitted.] Section
23 552(b) balances the Code's interest in
24 freeing the debtor of prepetition obligations
25 with a secured creditor's rights to maintain
26 a bargained-for interest in certain items of
collateral. It provides a narrow exception
to the general rule of 552(a).

25 944 F.2d at 502. (Emphasis in original.)

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1 Far East argues, in effect, that its prepetition security
2 agreement was both so specific and so broad that it clearly
3 covers post-petition greens fees and driving range fees, just
4 as it did prepetition. Such a reading, however, reads § 552(a)
5 virtually out of existence. The "narrow" exception of § 552(b)
6 was not intended to be instruction to lawyers on how to write
7 around the broad general purpose of § 552(a). Indeed, if read
8 as Far East contends, the exception would swallow the rule.
9 In re Bering Trader, Inc., 944 F.2d 500, 502 (9th Cir. 1991).

10 With the understanding that the § 552(b) exception is
11 intended to be a "narrow" exception to the general rule of
12 § 552(a), which cuts off security interests in revenues generated
13 postpetition by a debtor, the challenge for the Court has been to
14 ascertain whether Congress intended postpetition greens fees and
15 driving range fees to be the sorts of postpetition revenues that
16 fall within the § 552(b) exception.

17 In In re GGVXX, LTD., 130 B.R. 322 (Bankr. D.Col. 1991), the
18 court recognized the dearth of authority on the issue. There,
19 the court concluded that greens fees and similar fees are not
20 cash collateral. 130 B.R. at 326. Undermining that conclusion
21 to some degree, however, is the rationale of the court in looking
22 to hotel and motel revenues by analogy. That view was altered in
23 1994 by the decision in In re Days California Riverside Ltd.
24 Ptnrship, 27 F.3d 374 (9th Cir. 1994), followed a few months
25 later by the amendment to § 552(b) to add (b)(2), expressly
26 adding hotel and motel room rent revenues to the exception.

1 The court in In re Everett Home Town Limited Partnership,
2 146 B.R. 453 (Bankr. D.AZ 1992), reviewed GGVXX, and reached its
3 own conclusion that greens fees are not within the § 552(b)
4 exception "because such revenue although produced by the use of
5 the real property upon which the business is conducted, the
6 income is not proceeds of the property but the result of the
7 services provided by the business." 146 B.R. at 456. This Court
8 agrees. While non-exclusive transient use of the real property
9 is a component of golf play, the business of a golf course is
10 planting, seeding, mowing, repositioning holes daily, watering,
11 fertilizing, maintaining a property people can move across.
12 Without all of that, a course will rapidly revert to nature's
13 control and be of little or no use unless converted to farmland
14 or housing. So it is the business that generates the revenues
15 and while it involves use of the land in a sense, it is not rents
16 or other forms of the § 552(b) exceptions.

17 Far East has argued that if greens fees and range fees are
18 not a form of rental of their real property collateral, then the
19 fees are at least revenue from licenses to use the real property.
20 The bank points to its UCC filing in support of its claimed
21 security interest. One of the difficulties with that argument,
22 however, is the UCC is not generally applicable to interests in
23 real property. Cal. Comm. Code § 9109(d).

24 The Bank argues that greens fees and driving range fees are
25 "either real property or personal property", and they have a
26 security interest in both. As already noted, for the purpose of

1 this discussion, that may have been accurate prepetition. But it
2 begs the question of the effect of § 552(a), and it does not help
3 resolve what Congress intended by the "narrow" exception of
4 "proceeds, products, offspring or profits" of property secured
5 prepetition. As already discussed, the Bank's approach would
6 write the general rule of § 552(a) out of existence. Congress
7 was looking to protect the secured creditor's interest in its
8 prepetition collateral, and to the extent it was consumed,
9 dissipated, transformed or transmuted, the value received
10 postpetition for that prepetition interest should acquire
11 protected status as cash collateral to the extent applicable
12 state law otherwise would provide.

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1 For the reasons already stated, the Court finds and
2 concludes that postpetition revenues generated by this debtor
3 from greens fees and driving range fees are not encumbered by any
4 security interest of Far East National Bank because of the
5 operation of 11 U.S.C. § 552(a). Further, the Court finds and
6 concludes that the Bank's claimed security interest does not fit
7 any of the "narrow" exceptions to the general rule of § 552(a).
8 Accordingly, the Bank's motion to prohibit the debtor from using
9 its alleged cash collateral is denied because postpetition greens
10 fees and driving range fees are not its cash collateral within
11 the meaning of 11 U.S.C. § 363.

12 IT IS SO ORDERED.

13 DATED: SEP -1 2011

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16 PETER W. BOWIE, Chief Judge
17 United States Bankruptcy Court
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