

**IN THE DISTRICT COURT OF THE FIRST JUDICIAL DISTRICT OF THE
STATE OF IDAHO, IN AND FOR THE COUNTY OF BONNER**

CHARLES F. KARLE AND VALERIE A.)
KARLE, husband and wife,)
)
Plaintiffs,)

vs.)

DOUG VISSER AND VICKI VISSER,)
husband and wife,)
)
Defendants.)

CASE NO. CV-01-00097

MEMORANDUM OPINION
AND ORDER ON PLAINTIFFS'
MOTION CONTESTING
THIRD PARTY CLAIM
OF EXEMPTION

Karles attempted to execute on a judgment they had obtained against Vissers. Arthur M. Bistline filed a Third Party Claim of Exemption. Karles object to the Third Party Claim.

Janet Jenkins, attorney for Plaintiffs.

I

BACKGROUND

This action arises out of the sale of a business by Doug and Vicki Visser to Charles and Valerie Karle for the sum of \$85,000.00. Karles made a down payment of \$20,000.00. Thereafter, the remainder of the purchase price, which was \$65,000.00, was to be paid by Karles to Vissers.

The sale was pursuant to an Asset Transfer Agreement dated June 9, 1994. A Promissory Note was attached and labeled as Exhibit # 2. Under the Promissory Note, which was also dated June 9, 1994, Karles were to make monthly payments on the principal sum of \$65,000.00 plus interest at 9% per annum.

Karles made monthly payments until December of 2000. Differences between the parties arose and eventually Karles filed the instant lawsuit.

Following a Trial in March of 2002, the Jury returned a Verdict in favor of Karles in the total amount of \$53,932.50 and reduced the monthly payments due from Karles to Vissers pending certain events. The Jury also returned a Verdict in favor of Vissers in the amount of \$9,900.00.

In accord with the Jury Verdict, a Judgment was entered in favor of Karles against Vissers in the amount of \$53,932.50 and in favor of Vissers in the amount of \$9,900.00 on April 15, 2002. From April through July of 2002, Karles made payments.¹

A Writ of Execution based upon the Judgment was issued. At that time, the amount of principal and interest owed by Karles to Vissers was around \$51,520.55. Pursuant to the Writ of Execution, the Sheriff of Bonner County levied upon certain property belonging to Vissers consisting of: (1) the Judgment in favor of Vissers in the amount of \$9,900.00; and (2) the Asset Transfer Agreement.

On July 19, 2002, a Sheriff's Sale was held. Karles credit bid the sum of \$10,500.00 for the Judgment in favor of Vissers and credit bid the sum of \$22,500.00 for the Asset Transfer Agreement. The Sheriff of Bonner County refused to accept a credit

¹ On January 22, 2003, an Amended Judgment, which added an award of costs in the amount of \$2,673.00 to Karles, was entered.

bid by Vissers. Vissers filed a motion to set aside the Sheriff's Sale or, alternatively, to accept their credit bid. Vissers' motion was denied.²

On January 8, 2003, Arthur M. Bistline³ and Vissers entered into a Security Agreement. The collateral was described as

That certain promissory note dated June 9, 1994, payable from Charles and Valerie Karle to Doug and Vicki Visser, or order, in the face amount of \$65,000, a copy of which is attached as exhibit A, and currently in the possession of the Secured party pursuant to this Security agreement.

In the body of the Security Agreement, Vissers pledged

Their right title and interest in the collateral, and all the proceeds from the sale or transfer of the collateral, and any judgments resulting from the collection of the Note that is the collateral, and any payments made pursuant to the terms and conditions of the collateral, no matter whose hands those proceeds from the sale or transfer of the collateral, and judgments resulting from the collection of the Note that is the collateral, and payments made pursuant to the terms and conditions of the collateral, may go.

A UCC Financing Statement containing essentially the same description was filed on January 9, 2003.

On January 27, 2003, Vissers filed a Complaint against Karles in *Visser v. Karle*, Bonner County Case No. CV-03-00130.⁴ Vissers claimed that Karles were delinquent in their monthly payments under the Promissory Note and sought to recover the entire unpaid principal balance of the Promissory Note plus interest. In their Answer, Karles

² *See* MEMORANDUM OPINION AND ORDER IN RE (1) MOTION TO SET ASIDE SHERIFF'S SALE, AND (2) ATTORNEY FEES filed on November 9, 2002.

³ In the instant case, Vissers were formerly represented by Ian D. Smith. An Order for Leave to Withdraw was filed on February 12, 2003. At the time, the case was on appeal. Mr. Bistline subsequently filed a Notice of Appearance as Counsel for Appellant (Vissers) with the Appellate Court on January 13, 2003. On October 8, 2003, an Order of conditional dismissal of the appeal was entered. Mr. Bistline has, however, filed documents as "Attorney for Defendants" Visser. The Clerk of the Court in Bonner County does not have any counsel listed for Vissers.

⁴ That case was originally assigned to the Honorable John T. Mitchell and is now assigned to the Honorable Steve Verby. Arthur M. Bistline appeared as the attorney for Plaintiffs Visser.

asserted that the obligation had been canceled by virtue of the execution at the Sheriff's Sale on July 19, 2002.

After the credit bid was applied, the Judgment amount of \$53,932.50 was reduced to \$20,932.50.⁵ When interest and fees were added, the amount left owing to Karles on the Judgment was \$26,371.00 as of September 18, 2003.

Another Writ of Execution was issued. On October 5, 2003, the Sheriff of Bonner County levied upon *Visser v. Karle*, Bonner County Case No. CV-03-00130.

In response to the levy, a Third Party Claim of Exemption was filed on October 10, 2003. The Third Party Claim of Exemption was filed by "Arthur M. Bistline, on behalf of Douglas and Vicki Visser, and himself" The claimed exemption was for "the property 'The Civil Case 03-00130' entitled *Doug and Vicki Visser, Husband and Wife vs. Charles and Valerie Karle, Husband and wife.*" The basis for the exemption was that "a third party, Arthur M. Bistline, has a security interest in the levied upon property in the amount of \$41,354.00 and continuing."

Karles filed a Motion Contesting Third Party Claim of Exemption. The matter came on for Hearing. At the Hearing, the following exhibits were admitted:

Exhibit A	UCC Financing Statement
Exhibit B	Security Agreement
Exhibit C	Promissory Note

Both parties have submitted briefs in support of their positions.

II

DISCUSSION

Attachments and garnishments are addressed in Chapter 5 of Title 8 of the Idaho code. *Idaho Code § 8-527* provides for a third party claim of exemption as follows:

⁵ The Sheriff collected \$33,000.00 from Vissers at the Sheriff's Sale.

If any personal property attached, garnished or executed upon be claimed by a third person as his property, . . . the same rules shall prevail as to the contents and making of said claim, and as to the holding of said property, as in the case of a claim after levy upon execution, as provided in section 11-203, Idaho Code.

Chapter 2 of Title 11 of the Idaho Code addresses property that is subject to execution and the exemptions from execution. *Idaho Code § 11-203* sets forth the proper procedure for claims of exemption by third parties. The form for making a claim of exemption is found in *Idaho Code § 8-507C*. Although there is the generic possibility of “other property” subject to exemption, the list of properties set forth in the statute does not include lawsuits or choses in action.

In the instant case, Karles obtained a Writ of Execution and the Sheriff levied upon *Visser v. Karle*, Bonner County Case No. CV-03-00130 (the “2003 lawsuit”). Mr. Bistline filed a Third Party Claim of Exemption and Karles objected to the claim.

1. Execution Upon the Lawsuit

In this case, the Sheriff of Bonner County executed upon the Asset Transfer Agreement,⁶ to which the Promissory Note was attached and into which the Promissory Note was incorporated, in July of 2002. Karles made payments on the Promissory Note after the Trial until the time of the Sheriff’s Sale. At the Sheriff’s Sale on July 19, 2002, Karles obtained the Asset Transfer Agreement, which included the Promissory Note, through a credit bid. Therefore, as of that time, Karles “owned” the Asset Transfer

⁶ The Asset Transfer Agreement is attached as Exhibit C to the Affidavit of Vicki Visser in Support of Motion for Summary Judgment, which was filed on April 11, 2001. *See* Paragraphs 1.2.1 and 3.10.2.

Agreement, which included the Promissory Note. There was nothing left for Vissers to collect upon.⁷

In the UCC Financing Statement, Mr. Bistline states that the Promissory Note is currently in his possession. That may not be the case, however, for two reasons: (1) Karles contend that they have the original in their possession; and (2) even if such a document exists, the Karles took possession of the Asset Transfer Agreement, which included the Promissory Note, following the Sheriff's Sale.

Nonetheless, the 2003 lawsuit was filed by Vissers against Karles as a collection action based upon the Promissory Note. Shortly before the filing, the Vissers and Mr. Bistline entered into a Security Agreement and Mr. Bistline filed a UCC Financing Statement. Eventually, Karles attempted to execute on the amount remaining owing pursuant to their Judgment by levying upon the 2003 lawsuit. Therefore, it is necessary to address whether, if such a levy occurs, Mr. Bistline is entitled to a claim of exemption as a third party.

2. The Lawsuit as a Chose in Action that is "Proceeds"

Prior to the time when the 2003 lawsuit was filed, Vissers and Mr. Bistline entered into a Security Agreement. The "collateral" consisted of the Promissory Note.

Chapter 9 of Title 28 of the Idaho Code deals with "Secured Transactions." "Collateral" is described as the property subject to a security interest and includes:

- (A) *proceeds* to which a security interest attached;
- (B) accounts, chattel paper, payment intangibles, and *promissory notes* that have been sold; and
- (C) goods that are the subject of a consignment.

⁷ See *Idaho Code § 28-9-203(b)*, which provides that a security interest is enforceable against third parties with respect to the collateral only if the debtor has rights in the collateral or the power to transfer rights in the collateral to a third party.

(Emphasis added.) *Idaho Code § 28-9-102(12)*. Thus, a promissory note and/or, if applicable, its “proceeds” could be collateral subject to a security interest.

“Proceeds” is defined as:

- (A) whatever is acquired upon the sale, lease, license, exchange or other disposition of collateral;
- (B) whatever is collected on, or distributed on account of, collateral;
- (C) *rights arising out of collateral*

Idaho Code § 28-9-102(64).

The question then becomes whether a lawsuit or a chose in action is “proceeds” arising from the collateral because it is a right arising out of the collateral. A “chose in action” has been defined as “the right to bring an action to recover a debt, money, or thing.” BLACK’S LAW DICTIONARY, 7th ed., p. 234. Mr. Bistline argues that a “lawsuit” is a “chose in action” and constitutes “proceeds” of a promissory note. At first glance, it would seem that a chose in action or a lawsuit could be the “proceeds” of a promissory note.

A lawsuit is a “general intangible.” *Idaho Code § 28-9-102(42)*. A general intangible” includes a “thing in action,” which would be a lawsuit. A lawsuit and any corresponding recovery is properly treated as a thing in action and, therefore, a general intangible. To the extent that a security agreement might include general intangibles, a lawsuit would be part of the security agreement. *See In re Wiersma*, 283 B.R. 294, 49 UCC Rep.Serv.2d 309 (D.Id. 2002) (in bankruptcy action, debtors’ lawsuit against a third party was founded upon a contract and, as such, their claim fit within the

definition of a general intangible so that it was subject to a bank's security agreement; the claim against the third party constituted a thing in action).⁸

3. **Perfection of the Security Interest in Proceeds**

Idaho Code § 28-9-315(a)(2) states that “a security interest attaches to any identifiable proceeds of collateral.” A “security interest in proceeds is a perfected security interest if the security interest in the original collateral was perfected.” *Idaho Code § 28-9-315(c)*. If the lawsuit constitutes proceeds, then Mr. Bistline would have a perfected security interest in it.

4. **The Security Agreement**

At this point, however, it is necessary to go back to the foundation of Mr. Bistline's claim. His third party claim is based upon the Security Agreement that was entered into between him and Vissers.

The general effectiveness of a security agreement is addressed in *Idaho Code § 28-9-201(a)*. That statute states as follows:

Except as otherwise provided in the uniform commercial code, a security agreement is effective according to its terms between the parties, against purchasers of the collateral, and against creditors.

Therefore, the Security Agreement is effective “according to its terms” against creditors such as Karles.

The security agreement as a contractual basis has been explained as follows:

The security agreement . . . is an agreement that creates or provides for a security interest. . . . [A] security agreement is by definition the bargain of the parties in fact which creates or provides for a security interest. This definition implicitly recognizes that a security agreement is, above all, a contractual arrangement which sets forth the various rights and obligations of the parties. . . . As is

⁸ Mr. Bistline cited *Figueroa v. Acropolis*, 192 Ariz. 563, 968 P.2d 1048 (1998), but that case involved settlement funds as proceeds of a note.

generally the case in other contractual relationships, the agreement between the parties will control their actions according to its terms, and it will also control their relationship vis-à-vis third parties [T]he security agreement is effective according to its terms between the parties, . . . as against creditors, except to the extent that the Code otherwise provides.

Hawkland & Miller UCC Series § 9-201:2 [Rev Art 9].

Collateral must be sufficiently described. ***Idaho Code § 28-9-108.***

A close reading of the Security Agreement indicates that the “collateral” is the Promissory Note. To secure payment of attorney fees, Vissers pledged to Mr. Bistline their “right title and interest in the collateral,” which is the Promissory Note. They also pledged “all the proceeds from the sale or transfer of the collateral,” but to date there has been no sale or transfer of the Promissory Note. Additionally, they pledge “any judgments resulting from the collection of the Note that is the collateral,” but the 2003 lawsuit has not yet been reduced to judgment. Finally, they pledge “any payments made pursuant to the terms and conditions of the collateral,” but no payments have been made. The Security Agreement did not include general intangibles, either as collateral or as proceeds. Furthermore, the Security Agreement did not include all proceeds of whatever kind.

Thus, under the terms of the Security Agreement, the proceeds are limited. In this case, proceeds do not include the 2003 lawsuit or a chose in action, although a judgment from the 2003 lawsuit would be proceeds.

The case of *In re Wiersma, supra*, is of interest here. In that case, Wiersmas borrowed funds from a bank and granted a security interest in Wiersmas’ “Inventory . . . Accounts and Contract Rights . . . General Intangibles . . . Livestock . . . [and] Milk Products Quota In addition, the security agreement provided that the bank’s

“interest in the collateral shall be a continuing lien and shall include all proceeds and products of the collateral” In that case, the bankruptcy court held that a lawsuit against a third party constituted a general intangible and that such was subject to the security agreement. The bankruptcy court also held that the lawsuit represented the proceeds of encumbered cows and milk.

In the instant case, the question becomes whether the express terms of the Security Agreement and the UCC Financing Statement control or whether the provisions of *Idaho Code § 28-9-315* apply to automatically create a security interest in the lawsuit despite the specific language of the Security Agreement and the UCC Financing Statement. After consideration and without authority for guidance, it is determined that the Security Agreement and the UCC Financing Statement control.

Therefore, it can be concluded that, under the terms of the Security Agreement, the 2003 lawsuit does not constitute proceeds of the collateral. Although no specific conclusion was reached in Subsection 2 above, the conclusion here is in accord with the discussion there.

Since the lawsuit is not proceeds of the collateral, the lawsuit may be executed upon by Karles. The Motion Contesting the Third Party Claim of Exemption is granted.

III

CONCLUSION AND ORDER

Based on the foregoing discussion, it is hereby ORDERED that the Motion Contesting Third Party Claim of Exemption be and the same is hereby granted as set forth herein.

DATED this _____ day of December, 2003.

John Patrick Luster
District Judge

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing MEMORANDUM OPINION AND ORDER ON PLAINTIFFS' MOTION CONTESTING THIRD PARTY CLAIM OF EXEMPTION was mailed, postage prepaid, sent by interoffice mail, or sent by facsimile transmission on the _____ day of December, 2003, to the following:

Janet Jenkins
706 Superior Street, Suite C
Sandpoint, Idaho 83864
FAX: (208) 263-8228

ALL FIRST DISTRICT COURT JUDGES

The Honorable Don L. Swanstrom
Trial Court Administrator

Arthur M. Bistline
110 Wallace Avenue
Coeur d'Alene, Idaho 83814
FAX: (208) 665-7290

Clerk of the District Court

By: _____
Deputy Clerk

