

In re Aleris Interational, Inc.



CHAPTER 21

**GABRIELA CORONADO &
FILIP HERNAS**

1.



The Motion requires the Court to determine whether a seller of goods has any rights to the goods against a debtor who has retained possession of the goods pursuant to a sales contract but has not paid for them. Specifically, is a seller entitled to relief from the automatic stay to gain immediate possession of goods for which the debtor has not paid if the seller has neither possession of the goods nor a perfected security interest in them?

2.



- Based on an analysis of the relevant provisions of title 11 of the United States Code (the "Bankruptcy Code") and the Uniform Commercial Code (the "U.C.C."), the Court concludes that under these circumstances the seller is not entitled to relief from stay for the purpose of gaining immediate possession of such goods because the seller's unperfected security interest is subject to avoidance.

3.



- The Sales Agreement included the following provision (the "Title Provision"). 39*39 ACKNOWLEDGMENTS: I (We) promise to pay the balance due (Line 9) shown hereon in case or to execute a Time Sale Agreement (Retain Installment Contract), or a Loan Agreement for the purchase price of the Equipment, plus additional charges shown thereon, or to execute a Lease Agreement, on or before delivery of the Equipment ordered herein. Despite physical delivery of the Equipment, title shall remain in the seller until one of the foregoing is accomplished.

4.



- On February 12, 2009 (the "Petition Date"), Aleris, along with certain of its affiliates, voluntarily commenced its chapter 11 case in the United States Bankruptcy Court for the District of Delaware. On June 25, 2009, Holt filed the Motion seeking relief from the automatic stay to permit it to take immediate possession of the Equipment.

5.



- Holt contends that it, and not Aleris, owns the Equipment, and that it seeks relief from the automatic stay simply "[o]ut of an abundance of caution ... to take possession of its own property." Motion ¶ 6. In support of its ownership claim, Holt relies on the Title Provision in the Sales Agreement. Holt asserts that pursuant to this provision, Holt has retained title to the Equipment under U.C.C. § 2-401(3), and as such, the Equipment is not property of the Debtor's estate and is therefore not subject to the automatic stay.

6.



- The Debtor objects to the Motion on the grounds that Holt holds neither title to the Equipment nor any valid interest in the Equipment entitling it to relief from stay. First, the Debtor contends that Holt has failed to assert a valid ownership claim 40*40 because title to the Equipment has already vested in Aleris notwithstanding the Title Provision in the Sales Agreement. Second, the Debtor asserts that Holt does not have a valid security interest in the Equipment and is thereby not entitled to relief from stay. Relying on U.C.C. § 2-401(1), the Debtor claims that Holt retained, at most, a security interest in the Equipment through the operation of the Title Provision. However, because Holt did not perfect its security interest, the Debtor argues that Holt's rights are limited to those of an unsecured creditor.

7.



- Finally, with respect to the third requirement, the Court finds that Aleris had rights in the collateral when the security interest was created pursuant to U.C.C. § 9-203(b)(2) because the Debtor was in possession of the Equipment. Conn. Bank & Trust Co. v. Schindelman (In re Bosson), 432 F.Supp. 1013, 1018 (D.Conn.1977) ("The UCC does not define the term 'rights,' except to specify that it includes 'remedies.' The caselaw establishes the proposition that once a debtor acquires possession of an item of collateral pursuant to a sales contract or like agreement, the debtor has acquired sufficient 'rights' for Article IX purposes.") (citations omitted). Thus, the third requirement has been satisfied. Accordingly, the Court holds that the security interest retained by Holt attached to the Equipment.

8.



- However, because Holt held an unperfected security interest in the Equipment as of the date that the Debtor filed its bankruptcy petition, its security interest is therefore susceptible to avoidance by the Debtor under 11 U.S.C. § 544. See, e.g., *In re Phillips*, 77 B.R. at 650; *In re Cont'l Fire Trucks, Inc.*, 33 B.R. 713, 716 (Bankr.D.Mass.1983).

9.



- Explain who won and provide a conclusion