

DEBTOR/CREDITOR

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Bankruptcy Trumps Restrictive Covenant

Property owners can limit the activities which may be conducted on real property through the use of “restrictive covenants” written into the deed for the property. In certain circumstances, however, the federal bankruptcy statute can permit the sale of the property free from the limitations of a restrictive covenant.

A Michigan bankruptcy court recently permitted the sale of a debtor/developer’s remaining residential lots free from a restrictive covenant which provided that a related contractor “shall be the exclusive builder for all improvements within the above-described property.” The favored contractor could try to claim a portion of the proceeds for the loss of the exclusive right to build, but could not prevent the buyer from selecting the builder of its choice.

In re Signature Developments, Inc., 348 B.R. 758 (Bankr. E.D. Mich. 2006).

What’s in a Name

Michael R. Borden purchased two pieces of farm equipment and granted the equipment lender a security interest. The equipment lender’s financing statements identified the borrower as “Mike Borden”. Mr. Borden also obtained a loan from a bank for which he pledged all his assets as security. The bank filed a financing statement under his correct legal name. In Mr. Borden’s bankruptcy case, the bank sought the proceeds from the sale of the equipment, arguing that the equipment lender’s security interest was not properly perfected and, therefore, void in the bankruptcy case.

The Nebraska bankruptcy court agreed. A financing statement that is misleading does not perfect the creditor’s security interest. Under revised Article 9 of the UCC, a

name is misleading unless the financing statement would appear in a search of the filing office’s records under the borrower’s correct name using the office’s standard search logic. Because a search on Nebraska’s website under the name “Michael R. Borden” did not pick up the financing statement under the name “Mike Borden”, the equipment lender’s security interest was unperfected and void.

Genoa Nat’l Bank v. Southwest Implement, Inc. (In re Borden), 2006 Bankr. LEXIS 2911 (Bankr. D. Neb. 2006).

Owner Pays Corporation’s Taxes

If a corporation fails to remit employee withholding taxes to the IRS, the IRS may recover these payroll taxes from a “responsible person”. This liability falls on individuals who are responsible for ensuring that payroll taxes are paid and willfully fail to do so.

A small business owner hired his brother to work in the business and gave him responsibility for the filing and payment of quarterly tax returns. After becoming aware that the business was delinquent in payment of its payroll taxes, the owner continued to write checks to creditors other than the IRS. The owner’s general management authority together with his decision to pay other creditors rendered him liable for the payroll taxes.

In re Paris, 2006 Bankr. LEXIS 2153 (Bankr. M.D. Fla. 2006).

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This newsletter is intended to inform its readers of developments in the area of debtor/creditor relations. It is not legal advice or a legal opinion regarding any specific matter. You should consult a lawyer regarding any questions relating to your particular situation.

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