

Nos. A07-740 and A07-742

State of Minnesota
In Court of Appeals

In Re: A Purported Financing Statement in the
District Court of Ramsey County, Minnesota

Camille Bohlke, moving party,
Respondent (A07-740),

and

Bradley Parker, moving party,
Respondent (A07-742),

vs.

Kevin E. Giebel,
Appellant.

RESPONDENTS' BRIEF

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STATEMENT OF LEGAL ISSUE

- I. Whether the purported UCC financing statements filed by appellant are effective financing statements under the UCC where appellant did not obtain prior consent of the alleged debtors for said filings and where appellant has failed to demonstrate that he is a “secured party”?**

The trial court found that the financing statements were not effective and that said financing statements are fraudulent or otherwise improper pursuant to Minn. Stat. §545.05.

Minn. Stat. § 545.05

Minn. Stat. § 336.9-509

Minn. Stat. § 336.9-510

STATEMENT OF THE CASE

Appellant filed purported Uniform Commercial Code (hereafter "UCC") financing statements with the Minnesota Secretary of State's office claiming that he personally held a secured interest covering collateral belonging to respondents. Respondents herein each brought motions for judicial review of these purported UCC Financing Statements pursuant to Minn. Stat. § 545.05, claiming that appellant's filings were improper or fraudulent. The matters were heard before the Honorable Joanne Smith, Judge of District Court, Ramsey County, Minnesota. Appellant appeared pro se before Judge Smith and respondents were represented by the undersigned. Based upon all materials filed with the court and upon the results of the motion hearing, Judge Smith issued orders which found the financing statements to be ineffective. In addition, said statements were found to be improper or fraudulent. As a result of his conduct and pursuant to §545.05, Appellant was sanctioned and enjoined from similar future conduct.

STATEMENT OF FACTS

Appellant Kevin Giebel and respondents' attorney Mark Gilbert were both members of the law firm Giebel, Gilbert, Williams & Kohl, PLLP. The firm split in 2006. On or about September 1, 2006, when the firm's lease expired, each partner moved his office to a separate location. It was agreed that each attorney would continue representing the clients who were already represented by that attorney while the law firm was intact. With regard to the personal injury files handled by Respondents' attorney Mark Gilbert, the affected clients were contacted, informed and consented to this arrangement.

At some point prior to the above-referenced lease expiration of September 1, 2006, Respondent Giebel, or someone on his behalf, obtained information contained in the computer directories of certain clients whose contingent personal injury files were being handled by Attorney Gilbert. Appellant did not seek permission from Mr. Gilbert or the affected clients before obtaining and eventually using this client information. Included in this material was information contained in the computer directories/files of Respondents Bohlke and Parker. Appellant Giebel has never personally represented either of these individuals.¹

During the fall of 2006, after the members of the law firm of Giebel, Gilbert, Williams & Kohl, PLLP had split and gone on to separate locations, Appellant began

¹ See affidavits in support of § 545.05 motions contained in trial court record.

sending out letters to insurance adjusters on personal injury files that were being handled by respondents' attorney Mark Gilbert.² Appellant did so by using the above-referenced client information which was obtained without proper authority.³ Respondents' counsel Gilbert was not copied on any of the letters sent out by appellant. The letters stated generally that appellant was claiming a "personal" attorney's lien on the matter referenced.

In the weeks following, Appellant began submitting UCC Financing Statement forms via the internet for filing with the Minnesota Secretary of State claiming that he "personally" held a secured interest in property owned by respondents.⁴ Shortly thereafter, Appellant again sent letters to the insurance companies and others claiming that he now possessed a "perfected personal lien" on the potential tort claims. In these final letters, Appellant requested confidential information about the claim and asked that he be named on any checks that were disbursed.⁵

It is undisputed that Appellant claimed in his letters to possess liens, but had never actually established any such lien via a proceeding referenced under Minn. Stat. §481.13.

² Copies of some examples of these letters are contained in appellant's appendix pp. 18-23.

³ See affidavits in support of § 545.05 motion contained in the trial court record.

⁴ Copies of the filings which pertain to respondents are contained in appellant's appendix at pp. 24-25.

⁵ See affidavits in support of § 545.05 motions contained in the trial court record.

It is also not disputed that appellant has claimed to possess “perfected personal liens” against both respondents despite failing to obtain permission or authority from either respondent before filing the UCC Financing Statements here at issue.

Appellant Giebel was asked by respondent’s attorney to stop his actions. Respondent’s counsel believes appellant’s conduct was improper and that these clients should not be placed in the middle of a partnership dispute.⁶ After appellant refused, respondents then filed their Minn. Stat. §545.05 motions.⁷ Appellant contested the motions, filed more financing statements on other clients and sought discovery of unrelated partnership dispute matters to which he was not entitled in these narrow proceedings.⁸

This conduct by Appellant of improperly involving clients to gain advantage in a partnership dispute was referenced and discussed during the motion hearing before Judge Smith prior to the issuance of the trial court’s orders dated February 1, 2007. As Judge Smith specifically states in her orders, the findings of fact, conclusions of law and orders

⁶ See affidavits in support of § 545.05 motions contained in the trial court record.

⁷ See trial court record for original motion documents.

⁸ In addition to the Bohlke and Parker matters, it was eventually found that Appellant had filed the same materials (letters to insurers and improper/fraudulent UCC Financing Statements) on 19 other client files. After Respondents filed their §545.05 motions to stop this activity, Appellant Giebel then attempted to subject the Respondents to unreasonable discovery requests. Respondents objected. In her order sanctioning Appellant Giebel, Judge Smith found that Appellant Giebel was not entitled to the discovery he requested and that there was no proper basis shown by appellant for said discovery requests.

of the court were based, at least in part, upon what occurred at the hearing on the above matter.⁹ Appellant Giebel represented himself at the motion hearing where he spoke frequently. One of Judge Smith's findings is that Appellant Giebel had attempted to expand the scope of the hearing to include issues regarding a partnership agreement with Respondents' counsel and that appellant was seeking discovery herein to address an underlying partnership dispute.¹⁰

One day after the January 31, 2007 motion hearing, Judge Smith issued her orders.

⁹ Both orders indicated that they are based "upon all the files, records and proceedings herein, arguments and memoranda of counsel and the Court being fully advised in the premises..." In addition, both orders of the trial court reference that appellant Giebel has attempted to expand the scope of the hearing to include issues relating to a partnership dispute. Finally, the Bohlke order specifically states that Mr. Giebel is not entitled to the attempted discovery he requested, since it seeks to address an underlying partnership dispute rather than the §545.05 action.

¹⁰ See both orders of Judge Smith.

ARGUMENT

I. THE PURPORTED UCC FINANCING STATEMENTS FILED BY APPELLANT ARE INEFFECTIVE FINANCING STATEMENTS UNDER THE UCC. THE TRIAL COURT CORRECTLY FOUND SAID FINANCING STATEMENTS TO BE IMPROPER OR FRAUDULENT BECAUSE APPELLANT DID NOT ESTABLISH THAT HE HAD OBTAINED PRIOR CONSENT OF THE ALLEGED DEBTOR AND APPELLANT DID NOT ESTABLISH THAT HE IS A SECURED PARTY.

A. STANDARD OF REVIEW

Due to the relatively recent enactment of Minn. Stat. § 545.05, the undersigned could find no case law directly referencing said statute. However, when reviewing the findings of fact and conclusions of law of a trial court sitting without a jury, a trial court's findings of fact are given great deference and shall not be set aside unless clearly erroneous. If there is reasonable evidence to support the trial court's findings of fact, a reviewing court should not disturb those findings. Minn. R. Civ. P. 52.01; Fletcher v. St. Paul Pioneer Press, 589 N.W.2d 96, 101 (Minn. 1999). Also, the appellate court defers to credibility determinations made by the district court. Sefkow v. Sefkow, 427 N.W.2d 203, 210 (Minn.1988).

In the present matter, the trial court properly followed all requirements associated with Minn. Stat. § 545.05. Said statute authorizes an expedient motion proceeding designed to allow narrow judicial review of purported UCC financing statements. All steps of the motion are statutorily set forth, including a form for the motion and a form for the response to the motion. If the matter is contested and a hearing is requested, as

occurred here, the matter then proceeds to a motion hearing before a district court judge.

After pre-hearing submissions by the parties and after the motion hearing, the court issued its narrow findings of fact, conclusions of law and orders. The trial court's conclusions of law are supported by the factual record here. Further, appellant admits that he did not comply with the consent requirement referenced in § 545.05. As such, the orders of the trial court should be affirmed.

B. THE APPEAL SHOULD BE DISMISSED BECAUSE APPELLANT FAILED IN HIS DUTY TO PROVIDE THE NECESSARY RECORD FOR REVIEW.

It is well settled that the Appellant has the burden and duty to provide the appellate court with a record sufficient to show the alleged errors and all matters necessary to consider the issues. Minn. R. Civ. App. P. §110. Pursuant to Minn. Stat. §545.05, the entire underlying matter here is considered to be a "motion". The trial court's orders are based upon the results of a single motion hearing. Appellant represented himself at that significant hearing and everything he said there was potentially evidence/admissions for the court's consideration. Appellant failed to provide a transcript of that hearing on appeal. Without a proper record, the reviewing court must assume that the findings of the district court would be supported by what occurred at the hearing. Stringer v. Minnesota Vikings Football Club, 686 N.W.2d 545, 553 (Minn. Ct. App. 2004) (review granted) (court refused to consider Appellant's challenge to award of expert witness fees because Appellants failed to provide a transcript of the hearing on that issue); See Noltimier v.

Noltmier, 280 Minn. 28, 29, 157 N.W.2d 530, 531 (1968) (allowing dismissal of appeal based upon incomplete record); Godbout v. Norton, 262 N.W.2d 374, 376 (Minn. 1977) (reviewing court can not consider a sufficiency-of-evidence claim without a transcript).

Since it is presumed that the findings of the district court are supported by what occurred at the hearing on this matter, this appeal should be dismissed and the orders should be affirmed.

C. THIS APPEAL SHOULD BE DISMISSED BECAUSE THE ISSUES BRIEFED BY APPELLANT WERE NOT DECIDED BY THE DISTRICT COURT.

The issue presented and briefed by appellant states essentially that the district court erred by concluding that appellant's attorney lien was fraudulent or otherwise improper. However, this did not occur. Appellant did not establish that he had an attorney's lien and the court did not find an attorney lien existed or that such lien was fraudulent or improper. Apart from ordering appellant to stop claiming that he had a "perfected" lien, the district court orders in this case do not even mention an attorney's lien or the attorney lien statute. Rather, the district court orders state specifically that the *UCC financing statement(s)* filed by appellant against the two respondents are not effective records and, pursuant to Minn. Stat. §545.05, are fraudulent or otherwise improper. As is specifically required by Minn. Stat. §545.05, the issues addressed are very narrow and concern only UCC financing statements, not attorney's liens.

Moreover, appellant's assumption on review that he possesses an attorney's lien is

mistaken. As was obvious from his pro se statements/admissions at the motion hearing and from the affidavits submitted in support of respondents' §545.05 motions, appellant has never possessed a "personal" attorney lien (as he claims) against either of the respondents. It is undisputed that appellant himself has never represented or been employed by either respondent and he can thus never "establish" a personal attorney's lien against either respondent as that term is referenced in Minn. Stat. §481.13. Put a different way, appellant Giebel lacks standing to make individual or "personal" lien claims against these respondents.

The attorney's lien statute provides that a lien "may be established, and the amount of the lien may be determined, summarily by the court ... on the application of the lien claimant." Minn.Stat. § 481.13, subd. 1(c) (2006) (emphasis added). Prior to amendment by the legislature, § 481.13 distinguished between a proceeding to establish a lien and a proceeding to enforce a lien. Minn.Stat. § 481.13(3) (2000). The amendment to § 481.13 eliminated the distinction between establishment and enforcement and provided that a lien may be established and its amount summarily determined by the court. Thomas A. Foster & Associates v. Paulson, 699 N.W.2d 1, 6 (Minn. App. 2005).

Since he has never represented the respondents, appellant is incapable of possessing a "personal" attorney lien for his work. In addition, even if he were capable of possessing a lien, it is undisputed that appellant has never established an attorney's lien and should not now be heard to claim he has one.

In this case, the district court ruled that *the UCC financing statement* was fraudulent or otherwise improper, not an alleged attorney lien. Since appellant frames his entire appeal around a set of facts and legal issues that do not exist and did not occur, this appeal should be dismissed and the orders should be affirmed.

D. EVEN IF THIS COURT WERE TO ASSUME THE EXISTENCE OF AN ATTORNEY'S LIEN, MINN. STAT. §481.13 STILL SPECIFICALLY REQUIRES THAT THE LAW FOR THE FILING OF A SECURITY INTEREST BE FOLLOWED IF AN ESTABLISHED LIEN IS TO BE "PERFECTED". APPELLANT ADMITS HE DID NOT HAVE THE REQUIRED CONSENT FROM THE RESPONDENTS PRIOR TO FILING UCC FINANCING STATEMENTS. ACCORDINGLY, THE ORDERS OF THE DISTRICT COURT SHOULD BE AFFIRMED.

For the sake of argument, even if there were established attorney's liens, Minn. Stat. §481.13 still requires that to "perfect" such a lien, the law for the filing of a security interest must be followed. Minn. Stat. § 481.13 subd. 2(b) states in relevant part as follows;

(b) If the lien is claimed on the client's interest in personal property involved in or affected by the action or proceeding, the notice must be filed in the same manner as provided by law for the filing of a security interest.

Although appellant did not have a personal lien as he claimed, he nonetheless chose to file UCC Financing Statements on-line with the Minnesota Secretary of State in

a misguided effort to “perfect” said lien¹¹ and to gain some sort of perceived advantage in a wholly unrelated partnership dispute.¹² Appellant did so without giving prior notice and without obtaining consent from the alleged debtors (respondents). The UCC unequivocally requires the consent/authorization of an alleged debtor prior to the filing of a financing statement. Minn. Stat. §§336.9-509 and 336.9-510. By choosing this method of attempted perfection and then failing to follow the law, appellant caused the following consumer protection and criminal statutes to come into play; Minn. Stat. §§545.05, 604.17 and 609.7475.

1. Minn. Stat. §545.05

First, as was utilized by respondents in this case, Minn. Stat. §545.05 provides a very quick, narrow and inexpensive way for alleged debtors to obtain judicial review of an improperly/fraudulently filed financing statement. §545.05 is very clear that if the chosen method of perfection of an alleged secured interest involves the filing of a UCC financing statement, then consent of the debtor is required by law prior to filing the financing statement. Consent was admittedly never obtained in this case. §545.05 states in relevant part as follows:

¹¹ Whether appellant’s chosen method is the proper or correct method to file a legitimate security interest in this case is probably beyond the scope of this appeal. The UCC states several methods to “perfect” an interest depending mostly upon the nature of the collateral. The relevant fact is that appellant chose the filing of a UCC financing statement as his method and he failed to comply with the law in doing so.

¹² The district court saw evidence of appellant’s improper motive and the orders reflect how the court viewed appellant’s conduct.

Subdivision 1. Definitions. (a) As used in this section, a financing statement or other record is fraudulent or otherwise improper if it is filed without the authorization of the obligor, person named as debtor, or owner of collateral described or indicated in the financing statement or other record, or by consent of an agent, fiduciary, or other representative of that person or without the consent of the secured party of record in the case of an amendment or termination.

Presumably, this statute is meant to protect consumers against unscrupulous debt collectors or from persons who are seeking to wrongly affect someone's credit, whether intentionally or unintentionally. The searchable data base where the financing statements are filed is public and search results can therefore be used to adversely effect an individual's credit. Given the seriousness of such an offense and considering the ease in which anyone can file an online UCC financing statement with the Secretary of State without verification, there are at least two additional statutes that are meant to deter and punish such conduct. These are as follows:

2. Minn. Stat. § 604.17

§ 604.17 creates a cause of action and imposes strict civil liability for the filing of fraudulent or otherwise improper financing statements. Up to \$10,000.00 per case in nominal damages is authorized together with actual damages, costs and attorney's fees.

3. Minn. Stat. § 609.7475

§ 609.7475 provides for criminal penalties associated with the knowing filing of fraudulent or improper financing statements.

An alleged attorney's lien is not exempted from any of these above-referenced statutes and the requirement of debtor consent is crystal clear. When construing statutes, if the plain language of the statute is "clear and free from all ambiguity, the letter of the law shall not be disregarded ..." Minn. Stat. § 645.16 (2004); Toth v. Arason, 722 N.W.2d 437, 440 (Minn. 2006).

E. APPELLANT'S ARGUMENT THAT § 545.05 AND THE UCC DO NOT APPLY HAVE NO MERIT AND HAVE BEEN WAIVED

Appellant argues that § 545.05 does not apply and that he was under no obligation whatsoever to obtain consent from respondents before filing UCC financing statements.¹³ (Appellant's brief at p. 7). Appellant wrongly equates the presumed existence of an attorney's lien with "implied" consent of respondents to the filing of UCC financing statements. (Appellant's brief at p. 7). Even if such a lien actually existed, the mere existence of a lien does not logically lead to the existence of the consent necessary for the filing of valid UCC financing statements. These two items are mutually exclusive. Appellant's arguments to the contrary are completely unsupported.

¹³ Appellant now seeks to characterize his actions as "filing his attorney's liens" (Appellant's brief at p. 7). However, appellant actually filed UCC financing statements, not attorney's liens. Appellant's UCC financing statements do not even reference the words "attorney's lien". In addition, the financing statements at issue wrongly list appellant personally as the "secured party". The collateral in which appellant improperly/fraudulently claims a secured interest is described as "any and all" proceeds from respondents' personal injury accident claims "all pursuant to M.S.A. §481, et seq". All other issues aside, whether an alleged debtor's unresolved interest in a personal injury tort claim can be "collateral" is doubtful.

Appellant also argues that the law governing the filing of a security interest in Minnesota (the UCC) does not apply because an attorney's lien is a statutory lien. (Appellant's brief at p. 8-13). However, in making such argument, appellant completely ignores the express language of Minn. Stat. § 481.13 subd. 2(b) which states in relevant part as follows;

If the lien is claimed on the client's interest in personal property involved in or affected by the action or proceeding, the notice must be **filed in the same manner as provided by law for the filing of a security interest.** (Emphasis added).

The above language does not say that the matter is to be filed in the same *place* as a security interest, and that all other rules/laws relevant to the filing of a security interest can be ignored. Rather, the above language specifically indicates that said filing must be done in the same *manner* as provided by law for the filing of a security interest. The manner provided by law for the filing of a valid security interest in the form of UCC financing statements (appellant's chosen method) requires debtor consent. Minn. Stat. §§336.9-509, 336.9-510 and 545.05.

Finally, appellant goes to great lengths to argue that the UCC is in fact completely inapplicable to this case and that appellant is excluded from the requirements of the UCC. (Appellant's brief at 8 - 13). However, appellant has waived any such argument by his actions herein. The financing statements filed by appellant clearly state on their face that they are "UCC Financing Statements". They indicate on their face that they are filed via

“UCCOnlineFiling”. Most telling is the fact that at the bottom of the UCC forms at issue (at part 5 entitled “Alternative Designation”), appellant could have checked a box labeled “Non-UCC Filing”. He did not do so.

CONCLUSION

This appeal should be dismissed and the orders of the trial court affirmed because appellant failed to provide an adequate record for review and because appellant’s entire argument is based upon a set of facts and alleged rulings that did not occur. In the alternative, the orders of the trial court should be affirmed because all findings of fact and conclusions of law were proper herein.

Dated this 7th day of June, 2007.

Respectfully submitted,



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