**N.D.A.G. Letter to Meier (July 1, 1987)**

July 1, 1987

Honorable Ben Meier
Secretary of State
State Capitol
Bismarck, ND 58505

Dear Secretary Meier:

This is in response to your letter of June 15, 1987, in which you ask whether you may terminate a central notice filing without a court order or without a termination statement having been filed by the secured party. In my opinion, you cannot terminate a central notice filing in the absence of a court order directing you to do so or the filing of a termination statement by the secured party.

The mechanism for removing a name from a central notice system is provided in N.D.C.C. § 41-09-43. This section provides that where there is no outstanding secured obligation and no commitment to make advances, incur obligations, or otherwise give value, the secured party must on written demand by the debtor send the debtor a termination statement to the effect that he no longer claims a security interest under the financing statement. The procedure for filing a termination statement is set forth at N.D.C.C. § 41-09-43(2).

The role of the Secretary of State with respect to the central notice filing system is largely ministerial. Should a secured creditor improperly fail to prepare a termination statement upon demand of the borrower, it is expected that the borrower undertake his own legal action to redress that failure. N.D.C.C. § 41-09-43(1) provides that a secured party who fails to send a termination statement within ten days after proper demand by the borrower shall be liable to the debtor for $100 and, in addition, for any loss caused to the debtor by such failure. The law does not contemplate that the Secretary of State is under an obligation to review properly filed financing statements and remove them upon request of the debtor.

Mr. Lang has advised our office that the basis for his belief that the Secretary of State's Office should remove the name of the Bank of Steele from the central notice filing system is that an execution had been returned following the sale of Mr. Lang's cattle herd pursuant to a judgment. Mr. Lang stated that in his opinion N.D.C.C. § 41-09-47(5) would have the effect of cancellation of the underlying security agreement upon an execution sale. Based on my understanding of this provision of the Uniform Commercial Code, I believe Mr. Lang may have misconstrued the intent of N.D.C.C. § 41-09-47(5). Official comment 6 to U.C.C. § 9-501 [N.D.C.C. § 41-09-47(5)] states:

"6. Under subsection (1) a secured party is entitled to reduce his claim to judgment or to foreclose his interest by any available procedure, outside this Article, which state law may provide. . . . The second sentence of . . . subsection [(5)] makes clear that a judicial sale following judgement, execution and levy is one of the methods of foreclosure contemplated by subsection (1): such a sale is governed other law and not by this Article and the restrictions which this Article imposes on the right of a secured party to buy in the collateral at a sale under Section 9-504 do not apply."

(Emphasis supplied.) (Quoted in Dakota Bank & Trust Co. of Bismarck v. Reed, 402 N.W.2d 887, 891 (N.D. 1987).)

Moreover, Mr. Lang might wish to review N.D.C.C. § 41-09-47(1) which provides that:

1. When a debtor is in default under a security agreement, a secured party has the rights and remedies provided in this part and except as limited by subsection 3 those provided in the security agreement. He may reduce his claim to judgment, foreclose or otherwise enforce the security interest by any available judicial procedure. . . . The rights and remedies referred to in this subsection are cumulative.

(Emphasis supplied.)

While no North Dakota case appears to be directly on point, other courts have held that an "after-acquired property" clause continues to be effective even after an execution sale which fails to fully satisfy the secured debt. See, e.g., Bilar, Inc. v. Sherman, 40 Colo. App. 38, 572 P.2d 489 (1977).

In conclusion, unless the Secretary of State receives a court order or a proper termination statement from the Bank of Steele, the Secretary of State should not remove the central notice filing from his records. Mr. Lang should address his concerns as to the propriety of the central notice filing to the Bank of Steele or resolve the issue in court.

Sincerely,

Nicholas J. Spaeth

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