IN THE UNITED STATES BANKRUPTCY COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

IN RE:	§	
	§	
ARTHUR FRANKLIN TYLER, JR.,	§	CASE NO. 01-80343-SAF-13
DEBTOR.	§	
	§	
ARTHUR FRANKLIN TYLER, JR.,	§	
PLAINTIFF,	§	
	§	
VS.	§	ADVERSARY NO. 02-3530
	§	
TYWELL MANUFACTURING CORP. and	§	
JOHNNY CARDWELL,	§	
DEFENDANTS.	§	

MEMORANDUM OPINION AND ORDER

Arthur Franklin Tyler, Jr., the plaintiff, moves the court for partial summary judgment declaring that Tywell Manufacturing Corporation, a defendant, failed to retain collateral in satisfaction of a debt in compliance with Tex. Bus. & Com. Code Ann. § 9.505(b)(Vernon 1999), and that Johnny Cardwell, a defendant, converted the collateral. Both Tywell and Cardwell oppose the motion. The court conducted a hearing on the motion on March 12, 2003.

Summary judgment is proper if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, and other matters presented to the court

show that there is no genuine issue of material fact and that the moving party is entitled to a judgment as a matter of law. Celotex Corp. v. Catrett, 477 U.S. 317, 322-23 (1986); Anderson v. Liberty Lobby Inc., 477 U.S. 242, 250 (1986); Washington v. Armstrong World Indus. Inc., 839 F.2d 1121, 1122 (5th Cir. 1988). On a summary judgment motion the inferences to be drawn from the underlying facts must be viewed in the light most favorable to the party opposing the motion. Anderson, 477 U.S. at 255. A factual dispute bars summary judgment only when the disputed fact is determinative under governing law. Id. at 250.

The movant bears the initial burden of articulating the basis for its motion and identifying evidence which shows that there is no genuine issue of material fact. Celotex, 477 U.S. at 323. The respondent may not rest on the mere allegations or denials in its pleadings but must set forth specific facts showing that there is a genuine issue for trial. Matsushita Elec. Indus. Co., Ltd. v. Zenith Radio Corp., 475 U.S. 574, 586-87 (1986).

Tywell loaned Tyler $21,000. By a promissory note, Tyler promised to repay the loan by July 7, 2000. To secure the loan, Tyler pledged 390 shares of stock of Tywell that Tyler owned. In the event of default, the note provides "the Tywell Manufacturing

Corporation Stock Certificate Number 03 of 390 common stock shares will become property of Tywell Manufacturing Corporation."

Tyler did not pay the loan by July 7, 2000. He tendered five checks to Tywell on July 10, 2000, to pay the loan, but a check in the amount of $14,244.86 was returned for insufficient funds.

By letter dated July 12, 2000, Cardwell, Tywell's president, informed Tyler that Tyler had not paid the loan and that "I am also retaining your . . .stock certificates for and [sic] extended period."

By letter dated December 6, 2000, Cardwell on behalf of Tywell notified Tyler that as a result of the default:

> In accordance with Section 9.505(b) of the Texas Uniform Commercial Code, you are hereby notified that Tywell Manufacturing Corporation proposes to retain the 390 shares of common stock of Tywell Manufacturing Corporation issued in your name (the "Collateral") in complete satisfaction of the Debt, thus discharging the Debt and abandoning any claim against you for the deficiency. This action to discharge the debt and retain the collateral will become effective at 5:00 p.m. on Tuesday, December 19, 2000.

By letter dated December 21, 2000, Cardwell on behalf of Tywell notified Tyler:

> Due to your default, Tywell Manufacturing as of December 21, 2000 is exercising the following steps. 1. Tywell Manufacturing is forgiving the note in the amount of $21,000 payable to Tywell Manufacturing. . . .2. Tywell Manufacturing is retaining possession of the 390 shares of stock in Tywell Manufacturing that you pledged as collateral on the note. These steps are performed in accordance with Section 9.505(b) of the Texas Uniform Commercial Code.

Tyler contends that Tywell violated § 9.505(b)(1999). Tywell responds that the parties agreed in the note to waive the statutory notice requirements. Tyler replies that the notice provision of § 9.505(b) cannot be waived or eliminated.

The court quotes the Texas Uniform Commercial Code as applicable to this transaction. Section 9.505(b) provided:

> (b) In any other case involving consumer goods or any other collateral a secured party in possession may, after default, propose to retain the collateral in satisfaction of the obligation. Written notice of such proposal shall be sent to the debtor if he has not signed after default a statement renouncing or modifying his rights under this subsection. In the case of consumer goods no other notice need be given. In other cases notice shall be given to any other secured party who has a security interest in the same collateral and who has duly filed in the office of the Secretary of State or the County Clerk in the proper county in this state a financing statement indexed in the name of the debtor or from whom the secured party has received (before sending his notice to the debtor or before the debtor's renunciation of his rights) written notice of a claim of an interest in the collateral. If the secured party receives objection in writing from a person entitled to receive notification within twenty-one days after the notice was sent, the secured party must dispose of the collateral under Section 9.504. In the absence of such written objection the secured party may retain the collateral in satisfaction of the debtor's obligation.

Tex. Bus. & Com. Code Ann. § 9.505(b)(Vernon 1999).

As expressly stated in the December 6, 2000, notice, Tywell "in accordance with Section 9.505(b)" notified Tyler that it proposed to retain the stock in complete satisfaction of the debt. Under § 9.505(b), Tyler had 21 days to object to the retention of collateral in satisfaction of the debt. Tywell

declared the retention effective December 21, 2000. Tyler did not receive the 21 day notice required by the statute.

If a disposition of collateral has occurred in violation of § 9.505(b), Tyler may seek recovery under § 9.507(a).

> (a) If it is established that the secured party is not proceeding in accordance with the provisions of this subchapter disposition may be ordered or restrained on appropriate terms and conditions. If the disposition has occurred the debtor or any person entitled to notification or whose security interest has been made known to the secured party prior to the disposition has a right to recover from the secured party any loss caused by a failure to comply with the provisions of this subchapter. If the collateral is consumer goods, the debtor has a right to recover in any event an amount not less than the credit service charge plus ten per cent of the principal amount of the debt or the time price differential plus ten per cent of the cash price.

Tex. Bus. & Com. Code Ann. § 9.507(a)(Vernon 1999).

Tywell contends, however, that the parties agreed to vary the statutory procedure. Generally, the parties may agree to vary some terms of the Uniform Commercial Code. Tex. Bus. & Com. Code Ann. § 1.102(3)(c)(Vernon 1999). The note provides that after default, the stock "will become property of Tywell Manufacturing Corporation." The note does not state how the stock will become property of the corporation. In hindsight, Tywell argues that the stock becomes property of the corporation without notice or any act by Tywell. However, Tywell's actions after the default belie that argument. Tywell expressly acted in accordance with § 9.505(b), thereby evidencing that the stock

"will become" property of the corporation by following the applicable Texas statutory procedure. The note's silence on how the stock will become property of the corporation after default connotes that Texas law provides the implementing procedure.

In 2000, the then applicable § 9.501(c) of the Texas Business and Commerce Code provided that § 9.505 may not be waived or varied, but "the parties may by agreement determine the standards by which the fulfillment of these rights and duties is to be measured if such standards are not manifestly unreasonable...." Tex. Bus. & Com. Code § 9.501(c)(Vernon 1991). The note does not provide standards for fulfilling the rights and duties of § 9.505(b).

Based on the foregoing analysis, there is no genuine issue of material fact that Tywell did not retain the collateral in satisfaction of the debt in compliance with § 9.505(b) and the court concludes, as a matter of law, that § 9.505(b) applies.

Tyler also contends that Cardwell converted the stock. Under Texas law, conversion is established by proving that: (1) plaintiff owned, had legal possession of, or was entitled to possession of the property, (2) defendant assumed and exercised dominion and control over the property in an unlawful and unauthorized manner, to the exclusion of and inconsistent with plaintiff's rights, and (3) defendant refused plaintiff's demand for return of the property. Russell v. Am. Real Estate Corp., 89

S.W.3d 204, 210 (Tex.App.-Corpus Christi, 2002, no pet.).

Other than a reference to "I" in the July 12, 2000, notice, Tyler produced no evidence that Cardwell acted to control the stock. To the contrary, the summary judgment evidence establishes that there is no genuine issue of material fact that Cardwell acted only on behalf of Tywell, as its president. At the hearing on the motion for summary judgment, Cardwell requested that the court dismiss the complaint against him. The court grants that request.

Based on the foregoing,

IT IS ORDERED that Arthur Franklin Tyler's motion for partial summary judgment is **GRANTED IN PART** and **DENIED IN PART.**

IT IS FURTHER ORDERED that Tyler shall have a partial summary judgment declaring that Tywell Manufacturing Corp. did not retain the collateral in satisfaction of the debt in compliance with § 9.505(b)(1999).

IT IS FURTHER ORDERED that the complaint against Johnny Cardwell is **DISMISSED.**

IT IS FURTHER ORDERED that the trial docket call for the remaining issues is set for **May 12, 2003, at 1:30 p.m.**

Signed this 8th day of April, 2003.

Steven A. Felsenthal
United States Bankruptcy Judge