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UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF CALIFORNIA

In re

BETTA PRODUCTS, INC.,

No. 03-10925

Debtor(s).

_____ /
BETTA PRODUCTS, INC.,

Plaintiff(s),

v.

A.P. No. 03-1140

DS-MAX MANAGEMENT, INC., et al.,

Defendant(s).

_____ /
Memorandum on Motion to Dismiss and Motion for Summary Judgment

Plaintiff and Chapter 11 debtor in possession Betta Products, Inc., commenced this adversary proceeding in order to avoid the unperfected security interest of creditor DS-Max Management, Inc. The complaint also seeks a declaration that the avoided security interest, preserved for the estate by § 551 of the Bankruptcy Code, is senior to that of defendant Wells Fargo Bank. DS-Max has filed motion to dismiss the complaint; Betta has filed a motion for summary judgment.

DS-Max’s motion to dismiss is patently without merit. The complaint states a valid claim for

1 avoidance of its security interest. Contrary to DS-Max's notion, a motion to dismiss cannot be used to
2 seek dismissal of a portion of a complaint or a prayer for relief. A motion to dismiss can only be
3 granted where the complaint alleges no facts which would entitle the plaintiff to any relief. 27A **Fed.**
4 **Proc. L.Ed**, Pleadings and Motions, § 62:510. The motion to dismiss will accordingly be denied.

5 Betta has established that the lien of DS-Max is avoidable pursuant to § 544 of the Bankruptcy
6 Code because it allowed its financing statement to lapse. The only issue subject to dispute is whether
7 the avoided lien, preserved for the estate by operation of § 551, is senior to the prior, perfected lien of
8 Wells Fargo Bank. Technically, this dispute does not involve DS-Max; the court considers its arguments
9 as the real party in interest.

10 In 1998, Wells Fargo had entered into a written agreement with DS-Max's predecessor in
11 interest whereby Wells Fargo subordinated its security interest. Betta argues that, having avoided the
12 DS-Max lien, it steps into its shoes and has all its rights, including its rights under the subordination
13 agreement. However, the law does not support this theory; avoidance of a lien does not entitle the estate
14 to the benefits of a subordination agreement belonging to the holder of the avoided lien. *In re Kors, Inc.*,
15 819 F.2d 19, 23 (2nd Cir. 1987). If the estate's lien is superior to that of Wells Fargo, it will have to be
16 for some other reason.

17 For the foregoing reasons, Betta's motion for summary judgment will be granted and the lien of
18 DS-Max will be avoided and preserved for the benefit of the estate. However, it will be deemed
19 without substantial controversy in this adversary proceeding that Betta is not entitled to the rights of DS-
20 Max under the subordination agreement attached as Exhibit E to the complaint. Final judgment will not
21 be entered until all remaining issues have been resolved or the court has elected to abstain from
22 adjudicating them.¹

24 ¹If Betta has no other grounds for seeking priority over Wells Fargo, then Wells Fargo will be
25 entitled to a declaration that it has a valid senior lien. The court may decide to abstain from hearing any
26 dispute between Wells Fargo and DS-Max over their rights under the subordination agreement unless
they can show that such adjudication is clearly necessary to the bankruptcy estate.

1 Counsel for Betta shall submit an appropriate form of order granting Betta's motion for summary
2 judgment as set forth above and denying DS-Max's motion to dismiss the complaint.

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5 Dated: July 7, 2003

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Alan Jaroslovsky
U.S. Bankruptcy Judge
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