

**United States Bankruptcy Court
Northern District of Illinois
Eastern Division**

Transmittal Sheet for Opinions for Posting

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Bankruptcy Caption: In re Outboard Marine Corporation, et al.

Bankruptcy No. 00 B 37405

Adversary Caption: Bank of America, N.A. v. Outboard Marine Corporation, et al.

Adversary No. 01 A 00471

Date of Issuance: April 20, 2004

Judge: John H. Squires

Appearance of Counsel:

Attorney for Plaintiff: Melville W. Washburn, Esq., Natalie M. Kuehn, Esq., Sidley Austin Brown & Wood LLP, Bank One Plaza, 10 South Dearborn Street, Chicago, IL 60603

Attorney for Makino, Inc.: Jeffrey C. Dan, Esq., Crane, Heyman Simon, Welch & Clar, 135 South LaSalle Street, Suite 1540, Chicago, IL 60603-4297

**UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION**

IN RE:)	
)	
OUTBOARD MARINE)	Bankruptcy No. 00 B 37405
CORPORATION, et al.,)	Chapter 7
)	Judge John H. Squires
Debtors.)	
_____)	
)	
BANK OF AMERICA, N.A., successor)	Adv. No. 01 A 00471
in interest to BANK OF AMERICA, N.A.,)	
formerly NATIONSBANK, N.A.,)	
successor in interest to NATIONSBANK)	
OF TEXAS, N.A., in its capacity as)	
PREPETITION AGENT and DIP AGENT,)	
)	
Plaintiff,)	
)	
v.)	
)	
OUTBOARD MARINE)	
CORPORATION, et al.,)	
)	
Defendants.)	

MEMORANDUM OPINION

This matter comes before the Court on the motion of Bank of America, N.A. (the “Bank”) for summary judgment pursuant to Federal Rule of Bankruptcy Procedure 7056 and Federal Rule of Civil Procedure 56 on the complaint filed by the Bank seeking a determination of the extent, validity and priority of liens in the proceeds of certain machinery that Makino, Inc. (“Makino”) sold to Outboard Marine Corporation and its related debtor entities (“OMC”). For the reasons set forth herein, the Court denies the Bank’s motion.

I. JURISDICTION AND PROCEDURE

The Court has jurisdiction to entertain this matter pursuant to 28 U.S.C. § 1334 and Internal Operating Procedure 15(a) of the United States District Court for the Northern District of Illinois. It is a core proceeding under 28 U.S.C. § 157(b)(2)(K).

II. APPLICABLE STANDARDS

The Court authored an Opinion in this adversary proceeding on Makino's motion for partial summary judgment, *Bank of America, N.A. v. Outboard Marine Corp. (In re Outboard Marine Corp.)*, 300 B.R. 308 (Bankr. N.D. Ill. 2003), wherein it set forth, among other things, the applicable standards for summary judgment motions. *Id.* at 312-14. Those standards are incorporated herein by reference and will not be repeated.

III. UNDISPUTED FACTS AND BACKGROUND

The Bank gleans its facts from the Court's prior Opinion. Makino does not dispute any of those facts. Accordingly, those facts are incorporated here by reference. 300 B.R. at 316-18.

The Bank filed the instant motion for summary judgment on February 4, 2004. The Bank argues that there is no documentation objectively reflecting the parties' intent to create a security interest as required by North Carolina law. Because of this alleged deficiency in Makino's claim, the Bank seeks summary judgment, asking the Court to find that Makino has no interest capable of taking priority over the Bank's secured debt.

IV. DISCUSSION

The Court set forth the applicable authority in its prior Opinion regarding the creation of security interests under North Carolina law. *See* 300 B.R. at 319-324.

Specifically, the Court noted:

Determining whether the parties intended to create a security interest is a two-step process. The first step requires the court to decide whether there is a written document or documents containing language that objectively indicates that the parties intended to create a security interest. . . . If such a document or documents exists, then the fact finder must determine whether the parties actually intended to create a security interest.

Id. at 324 (citations omitted).

The Bank argues that because Makino's purported security interest fails the test at step one—whether there is a written document or documents containing language that objectively indicates that the parties intended to create a security interest—the Court need never reach step two—whether the parties actually intended to create a security interest. The Bank contends that the Court declined to directly answer whether objectively, the written documents that exist indicate the parties' intent to create a security interest. It is on this question of law that the Bank seeks summary judgment.

In making the determination of whether objectively the documents indicate that the parties intended to create a security interest, the Court posited:

Looking beyond the financing statement to the terms and conditions accompanying the Makino invoices, the Court finds that these documents fall short of clearly manifesting OMC's intent to grant, create and provide for a security

interest. . . . Although the language itself strongly demonstrates Makino's intention to create such a security interest, there is no real indication of OMC's acquiescence.

Consideration of the financing statement in conjunction with the invoice terms and conditions presents a close call as to whether the documents indicate that the parties intended to create a security interest. However, even if the Court were to find, as a matter of law, that the documents objectively reflect the parties' intent to create a security interest, the Bank disputes that OMC actually intended to do so.

Id. at 324-25.

The Court found that examination of the financing statement, which was allegedly signed by an agent of OMC but did not reference the invoices, and examination of the invoice terms and conditions, which were not signed by an agent of OMC but included language whereby Makino reserved a security interest, presented a "close call" on the issue of whether those documents objectively reflect the parties' intent to create a security interest. *Id.* at 325. While this determination is a question of law, the Court finds that summary judgment is not appropriate because further inquiry into the facts of the matter is necessary to clarify the application of the law. *See Brockbank v. Best Capital Corp.*, 341 S.C. 372, 378, 534 S.E.2d 688, 692 (2000) (citation omitted). The limited record before the Court lacks evidence of what OMC's actual intent was regarding the reserved security interest asserted by Makino. The Bank's papers remain as silent on this point for this motion as were Makino's papers on its prior motion for summary judgment. Accordingly, the Court denies the Bank's motion for summary judgment because it fails to adequately demonstrate that it is entitled to judgment as a

matter of law.

V. CONCLUSION

For the foregoing reasons, the Court denies the Bank's motion for summary judgment.

This Opinion constitutes the Court's findings of fact and conclusions of law in accordance with Federal Rule of Bankruptcy Procedure 7052. A separate order shall be entered pursuant to Federal Rule of Bankruptcy Procedure 9021.

ENTERED:

DATE: _____

John H. Squires
United States Bankruptcy Judge

cc: See attached Service List

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Plaintiff,)	
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v.)	
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OUTBOARD MARINE)	
CORPORATION, et al.,)	
)	
Defendants.)	

ORDER

For the reasons set forth in a Memorandum Opinion dated the 20th day of April 2004,
the Court denies the motion of Bank of America, N.A. for summary judgment.

ENTERED:

DATE: _____

John H. Squires
United States Bankruptcy Judge

cc: See attached Service List