

IN THE DISTRICT COURT OF GARFIELD COUNTY, NEBRASKA

COMMUNITY FIRST NATIONAL BANK,
Plaintiff,

vs.

**BURWELL LIVESTOCK MARKET, INC.,
et al.,**
Defendants.

Case No. 2927

**ORDER GRANTING
DEFENDANTS' DEMURRERS**

DATE OF HEARING: July 14, 1999.
DATE OF DECISION: October 21, 1999.
TYPE OF HEARING: Telephone conference call with no evidence and record waived pursuant to Rule 8-4.
APPEARANCES:
For plaintiff(s): Howard P. Olson, Jr.
For defendant(s): Barry D. Geweke.
SUBJECT OF HEARING: Demurrers of the individual defendants.
FINDINGS: The court finds:

1. To the extent of any conflict, the federal Food Security Act (7 U.S.C. § 1631) preempts state law, and particularly NEB. REV. STAT. U.C.C. § 9-307. The central filing scheme contemplated by federal law has been implemented in Nebraska by statute. NEB. REV. STAT. § 52-1301 *et seq.* (Reissue 1998).

2. The federal statute, subject to certain exceptions, allows “a *buyer* who in the *ordinary course* of business *buys* a farm product from a seller engaged in farming operation” to take free of the security interest. 7 U.S.C. § 1631(d) (emphasis supplied). If the transaction described in paragraph 23 of the plaintiff’s Second Amended Petition fits the definition and is not subject to the exceptions specified in § 1631(e), then the children took free of the security interest and their subsequent sale through the livestock market to the individual buyers was also free of the security interest.

3. However, the petition fails to allege facts sufficient to show that children: (1) were not

“buyers,” (2) were not acting in the “ordinary course” of business, or (3) were not “buying” the calves. The inferences arising from the language of paragraph 23 is equally consistent with activities within the definition as with conduct outside of the definition. Consequently, the petition may be equally construed as to describe circumstances cutting off the plaintiff’s security interest or circumstances in which the security interest would continue. A petition must state sufficient facts to fit the claim into the former situation to the exclusion of the latter, or the petition fails to state a cause of action.

4. This defect may be capable of being cured by amendment. Leave will be granted to amend.

5. Even if the plaintiff was forced by the circumstances to plead facts showing that the children were, in fact, “buyer[s] who in the ordinary course of business [bought] a farm product from a seller engaged in farming operation,” section 1631(e)(2) specifies an exception for a buyer which fails to register in a central filing state where the secured party has filed an effective financing statement. Although the plaintiff has pleaded the effective financing statement, it has failed to plead that the children failed to register. If this became necessary to be pleaded, it may be possible to be cured by amendment.

6. The demurrers should be sustained with leave to amend.

ORDER: The demurrers are sustained.

FUTURE PLEADINGS: With regard to future pleading:

1. The plaintiff is allowed 20 days from the date of this order to file a third amended petition.
2. The defendants shall answer or demur to the third amended petition within 10 days after it is filed. Failure of defendant Burwell Livestock to plead shall be deemed an election to stand upon the most recently filed answer.
3. When the answer(s) is/are filed, the plaintiff shall reply or plead to it/them within 10 days.

Dated: October 21, 1999.

If checked, the Court Clerk shall:

- : Mail a copy of this order to all counsel of record and to any pro se parties.
Done on _____, 19____ by _____.
- : Note the decision on the trial docket as: 10/21/99 Signed “Order Granting Defendants’ Demurrers” entered.
Done on _____, 19____ by _____.

Mailed to:

BY THE COURT:

William B. Cassel, District Judge

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