

UNITED STATES BANKRUPTCY COURT
DISTRICT OF SOUTH DAKOTA
Central Division

In Re:)	
)	Bankr. No. 93-30010
KERRY LUTTER)	
JANET LUTTER)	Adversary No. 95-3011
)	
Debtors)	Chapter 7
)	
JOHN S. LOVALD, TRUSTEE)	MEMORANDUM OF DECISION
)	RE: TRUSTEE'S COMPLAINT
Plaintiff,)	TO DETERMINE VALIDITY AND
vs.)	EXTENT OF FSA'S LIEN ON
)	CERTAIN PERSONAL PROPERTY
)	
UNITED STATES OF AMERICA ON)	
BEHALF OF FSA, AGRICULTURE)	
CREDIT DIVISION)	
Defendant.)	

The matters before the Court are the parties' cross motions for summary judgment, stipulated facts, and briefs regarding Trustee John S. Lovald's complaint to determine the validity and extent of the lien held by the Farm Service Agency-Ag Credit on Debtors' farm equipment and machinery. This is a core proceeding under 28 U.S.C. § 157(b)(2). This letter decision and subsequent order and judgment shall constitute the Court's findings and conclusions under F.R.Bankr.P. 7052. As set forth below, the Court concludes that the Farm Service Agency does not have a perfected security interest in Debtors' machinery and equipment because FSA did not timely file a second continuation statement.

I.

On August 17, 1982, Kerry Lutter and the Farmers Home Administration (now the Farm Service Agency or FSA) entered a

security agreement whereby Kerry Lutter pledged to FSA certain personalty, including crops, farm machinery and equipment, and livestock. The agreement specifically stated that it covered later acquired farm equipment and inventory.

FSA filed a financing statement on September 10, 1982 that was signed by Kerry Lutter (number 167586). The collateral listed on the financing statement included "farm and other equipment." FSA filed an amendment to financing statement number 167586 on January 20, 1986 to add the name of Janet K. Lutter. Both Janet Lutter and Kerry Lutter signed this amendment.

On May 4, 1987, FSA filed a continuation statement on the original financing statement number 167586. FSA filed a second continuation statement of the original financing statement on March 18, 1992.

The Lutters filed a Chapter 13 petition on February 22, 1993. The case was converted to a Chapter 7 proceeding on October 16, 1995. Chapter 7 Trustee John S. Lovald commenced this adversary proceeding to determine the validity and extent of FSA's secured interest in proceeds from the sale of the bankruptcy estate's farm equipment and machinery.

The two issues stipulated by the parties are: First, was FSA's March 18, 1992 continuation of its financing statement effective? Second, did FSA's financing statement adequately put other parties on notice that it held a secured interest in certain farm machinery and equipment that Debtors may have acquired after

the financing statement was filed? The second issue need not be addressed because the first one is answered in the Trustee's favor.

II.

The starting point is the South Dakota Code. When read carefully, it is not ambiguous. Therefore, there is no reason to go beyond the plain language of the statutes. See *United States v. Ron Pair Enterprises, Inc.*, 109 S.Ct. 1026, 1030 (1989).

A financing statement is effective for five years and sixty days from the original filing. S.D.C.L. § 57A-9-403(2). A continuation statement must be filed within six months before the "five-year" period specified in subsection (2) expires, not when the five-year *and* sixty-days period in subsection (2) expires. S.D.C.L. § 57A-9-403(3). The first continuation statement extends the effectiveness of the original financing statement "for five years after the last date to which the filing was effective[.]" *Id.*

Succeeding or subsequent continuation statements are slightly different. Under § 57A-9-403(3), a succeeding continuation statement may be filed in the "same manner," that is, within six months before the expiration of the previous continuation statement. Each continuation statement extends the original filing for another five years. However, the additional sixty days provided by § 57A-9-403(2) is recognized only once. While each continuation statement extends the previous period for five years from the expiration of the preceding period, see *Farm Credit*

Services v. Roth (In re Roth), 171 B.R. 357, 359-60 (Bankr. D.S.D. 1994) (Ecker, J.), only the original effectiveness period expires after five years and sixty days from filing. *Id.*

Most courts have concluded that a continuation statement that is filed prematurely is not effective. See *Rainbow Mfg. Co. v. Bank of Fitzgerald (In re Rainbow Mfg. Co.)*, 150 B.R. 857, 859-60 (M.D. Ga. 1993). This is known as the "Callahan Rule." *Id.*

III.

FmHA's original financing statement was filed September 10, 1982. It expired November 9, 1987, which was five years and sixty days after it was filed.¹ The window for filing the first continuation statement was between March 10, 1987 and November 9, 1987, which was six months before or sixty days after five years from September 10, 1982. Since FSA filed its first continuation statement on May 4, 1987, it was within this window and, therefore, timely.

Absent another timely continuation statement, FSA's perfected security interest would have lapsed on November 9, 1992, which is five years after the original financing statement would have expired. The window for filing the second continuation statement began May 11, 1992, which was six months before the first continuation statement expired on November 9, 1992. However, FSA filed its second continuation statement prematurely on March 18,

¹ The sixtieth day after September 10, 1987 was Sunday, November 8, 1987. The next business day was Monday, November 9, 1987. S.D.C.L. § 1-5-4.

1992. Consequently, FSA's second continuation statement was not effective. After November 9, 1992, FSA no longer had a perfected security interest in Debtors' machinery and equipment.² Trustee Lovald now stands first in line for this collateral, as provided by 11 U.S.C. § 544(a).

Apparently, FSA had determined that the original financing statement expired September 10, 1987 (five years from the original filing date) and that the first continuation statement expired another five years later on September 10, 1992. The second continuation statement on March 18, 1992 would then have been timely because it would have been inside the six-month window before September 10, 1992, which began March 10, 1992. However, the original financing statement did not expire until November 9,

² Although the issue was not raised by the parties, some courts may question the effect of FSA's June 20, 1986 amendment to the original financing statement that added Janet Lutter as a debtor. The addition of her as a debtor may be considered an addition of collateral that altered the dates when continuation statements needed to be filed regarding her interest in the collateral. See *J.I. Case Co. v. Crestar Bank*, 923 F.2d 848 (4th Cir. 1991) (table only), 14 U.C.C. Rep. Serv. 2d (Callaghan) 294 (amendment to financing statement that adds collateral is effective only from the filing date of the amendment and a continuation statement as to the added collateral must be filed five years from the date the amendment was filed); *In re Griffin*, 141 B.R. 207 (Bankr. D. Kan. 1992) (where financing statement did not list wife as a debtor, creditor was rendered unperfected as to her interest in the property); and *First Manufactured Housing Credit Corp. v. Clarkson Mobile Home Park, Inc.*, 8 U.C.C. Rep. Serv. 2d 1259 (N.Y. App. Div. 1989) (financing statement in husband's name was not sufficient to perfect security interest in certain property against subsequent judgment creditor of wife). Without knowing what interest she had in the collateral and when she obtained that interest, the impact of the amendment on the effectiveness of the filing cannot be determined.

1987 -- five years plus sixty days from the original filing date of September 10, 1982 -- and the first continuation statement did not expire until five years later on November 9, 1992. Thus, when FSA filed its second continuation statement on March 18, 1992, it missed by several weeks the six-month window before November 9, 1992 that began May 11, 1992. The error likely arose from the fact that the original financing statement expires five years *and* sixty days from the filing date but that the first continuation statement must be filed within six months before the first five years after the original filing date expires. The sixty-day "grace period" is not included in both deadlines.

The Court acknowledges that its conclusion is different from that of the South Dakota Secretary of State as set forth in the Secretary's handbook dated July 1, 1987. The handbook states that each continuation statement extends the original financing statement by five years from the filing date. The handbook apparently does not include the sixty day "grace period" from § 57A-9-403(2) when determining when the original filing expires. That may have been the legislative intent. However, subsection (2) of § 57A-9-403 provides that the original financing statement expires five years *and* sixty days after filing. This is the expiration date that must be used in subsection (3) to determine when the first and succeeding five-year continuation periods begin and end.

Trustee Lovald shall submit an Order and a Judgment in

compliance with this Memorandum of Decision.

Dated this _____ day of April, 1996.

BY THE COURT:

Irvin N. Hoyt
Chief Bankruptcy Judge

ATTEST:
Charles L. Nail, Jr., Clerk

By: _____
Deputy Clerk

(SEAL)