
In the United States Bankruptcy Court
for the
Southern District of Georgia
Savannah Division

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|------------------------|---|------------------------|
| In the matter of: |) | |
| TOPGALLANT LINES, INC. |) | Chapter 7 Case |
| |) | Number <u>89-41996</u> |
| <i>Debtor</i> |) | |
| |) | |
| |) | |
| AMBASSADOR FACTORS, |) | |
| A Division of |) | |
| Fleet Factors, Inc. |) | |
| |) | |
| <i>Movant</i> |) | |
| |) | |
| |) | |
| v. |) | |
| |) | |
| TOPGALLANT LINES, INC. |) | |
| |) | |
| <i>Respondent</i> |) | |

ORDER ON MOTION FOR RELIEF FROM STAY

The above motion for relief raises, once again, the question of how the provisions of 11 U.S.C. Section 362 are to be interpreted when there is pending litigation over the extent, validity, and priority of the Movant's lien. Because I conclude, on the facts of this case that that litigation must be concluded prior to granting relief from stay, the

Motion will be denied.

Ambassador Factors ("Ambassador") previously filed a motion for relief in this case which was denied in part because the extent, validity, and priority of Ambassador's UCC lien was challenged by other parties. I ruled that that dispute could not be resolved as part of a Section 362 motion. Matter of Topgallant Lines, Inc., Chapter 11 Case No. 89-41996 (Bankr. S.D.Ga., April 4, 1990). Thereafter, Ambassador filed an action to obtain such a determination. I entered rulings in that adversary which are now on appeal to the United States District Court. Matter of Topgallant Lines, Inc., 125 B.R. 682 (Bankr. S.D.Ga. 1991); Matter of Topgallant Lines, Inc., 138 B.R. 314 (Bankr. S.D.Ga. 1992). In essence I ruled that the UCC lien is inferior to valid maritime liens but that many of the asserted liens had been waived or released by acts of the various holders. The result of my rulings is that Ambassador's UCC lien over certain proceeds of debtor's accounts receivable (securing a debt of over \$4 million) is second in priority to approximately \$549,000.00 of remaining maritime claimants but superior to other holders of lien claims totalling in the millions of dollars. At the present time the proceeds held by the Trustee in a segregated account total approximately \$1.6 million and thus will be insufficient to pay the Ambassador claim in full.

Ambassador therefore argues that there is no equity in the assets held by the Trustee and, since this is no longer a reorganization case, that the elements of Section 362

are met, mandating that relief should be granted. The Trustee, supported by holders of maritime lien claims that are, as a result of my rulings in the adversary proceeding, inferior to the claim of Ambassador, argue that the motion should be denied since reversal of my order would entitle others, not Ambassador, to those funds.

Perhaps the best authority relied on by Ambassador is Matter of Vitreous Steel Products Co., 911 F.2d 1223 (7th Cir. 1990), which clearly recognizes that stay relief proceeds are intended to be expedited and that ordinarily the only issue will be "the claim of the creditor and the lack of adequate protection or existence of other cause for relief The hearing will not be the appropriate time at which to [litigate] other issues." However, the court did not establish a *per se* rule that the existence of certain defenses or counterclaims will never be a sufficient basis for deferring action or denying relief. Indeed, the court only held that the prior granting of stay relief did not constitute collateral estoppel against such issues being litigated later in a separate proceeding. Vitreous Steel is no guidance on the issue before me which is whether relief should be granted when such fundamental issues regarding the Movant's security interest are known to exist, are being actively litigated, and are unresolved. Rather the appropriate rule is that while such issues are not to be litigated in the context of stay relief, nevertheless they may be considered by the court in exercising its discretion to lift the stay. S.Rep.No. 95-989, 95th Cong., 2d Sess. 55 (1978), U.S. Code Cong. & Admin. News 1978, pp. 5787, 5841. *See also* Matter of Georgia Steel, Inc., 19 B.R. 523 (Bankr. M.D.Ga. 1982).

It is well-settled that when the court is made aware at a stay relief hearing that fundamental questions exist over the extent, validity, or priority of a movant's security interest it is appropriate to deny relief until such issues can be resolved in an adversary proceeding. In re Tally Well Service, Inc., 45 B.R. 151 (Bankr. E.D.Mich. 1984); In re Davenport, 34 B.R. 463 (Bankr. M.D.Fla. 1983); In re Pappas, 55 B.R. 658 (Bankr. D.Mass. 1985); Matter of Rice, 82 B.R. 624, 626 (Bankr. S.D.Ga. 1987).

In addition, I agree with the assertion by the Trustee that 11 U.S.C. Section 502(d) demands this result. The Trustee has filed two adversary proceedings alleging that Ambassador has been the recipient of preferential transfers. *See* James L. Drake v. Frank L. Peeples, et.al., Chapter 7 Case No. 89-41996, Adversary No. 89-4141; James L. Drake v. Frank L. Peeples, et.al., Chapter 7 Case No. 89-41996, Adversary No. 89-4142 (also alleging that Ambassador was a recipient of certain fraudulent conveyances and post-petition transfers). The Trustee correctly asserts that Ambassador's claim should be "disallowed" until it turns over the funds sought or an adjudication of its rights is concluded. *See* Mid Atlantic Fund, Inc., 60 B.R. 604 (Bankr. S.D.N.Y. 1986); Matter of Eye Contact, Inc., 97 B.R. 990, 992 (Bankr. E.D.Wisc. 1989).

Ambassador argues that there is no bankruptcy interest to protect because either Ambassador or maritime lien claimants will ultimately recover these monies. Therefore, it asserts that there is no interest held by the bankruptcy estate for the benefit of

unsecured creditors in these funds. That argument is beguiling in its simplicity and ultimately, indeed, there may be no recovery for unsecured creditors. Nevertheless, the funds at issue are property of the estate under Section 541. The Trustee has an affirmative duty to collect property of the estate, and to be "accountable" for it. 11 U.S.C. §704(1) and (2). While the Trustee may, after notice and hearing, propose to abandon property of the estate which is burdensome or of inconsequential value under 11 U.S.C. Section 554, he has not done so. Ambassador argues that he should do so now and let the parties pursue their state law remedies to the funds. To do so, however, would violate a fundamental purpose of bankruptcy. Historically and under the Code, bankruptcy has a two-fold goal. One is to afford relief to the debtor - the second is to insure an orderly and fair distribution of assets. Many of the provisions of the Code serve both purposes. The automatic stay clearly provides relief to the debtor; however, it also prevents the "race to the courthouse," self-help repossession and other state law approved actions whereby one creditor's interest may be served at the expense of another. This is such a case. Unlike real estate which is routinely abandoned when multiple liens exist which exceed the value of the collateral and the state remedies are sufficient to protect creditors interests, the asset in question here is cash. If abandoned to the possession of Ambassador, the asset may be dissipated by the time that the appellate process resolves entitlement to those funds. Because of the risk to the fundamental bankruptcy purpose of insuring a fair and orderly distribution of this asset, which cannot be ensured if the Trustee relinquishes possession, and under the authorities previously cited, I hold that the Motion for Relief must be and the same is therefore denied.

Lamar W. Davis, Jr.
United States Bankruptcy Judge

Dated at Savannah, Georgia

This ____ day of February, 1993.