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

In the matter of:	)	
	)	Adversary Proceeding
TOPGALLANT LINES, INC.	)	
(Chapter 7 Case <u>89-41996</u> )	)	Number <u>90-4072</u>
	)	
<i>Debtor</i>	)	
	)	
	)	
	)	
AMBASSADOR FACTORS,	)	
Division, Fleet Factors Corp.	)	
	)	
<i>Plaintiff</i>	)	
	)	
	)	
v.	)	
	)	
FIRST AMERICAN BULK	)	
CARRIER CORPORATION, et.al.	)	
	)	
<i>Defendant</i>	)	

**SUPPLEMENTAL SCHEDULING ORDER**

On April 12, 1995, the Court entered a Scheduling Order setting the completion date for all discovery in this proceeding as May 25, 1995. The Court subsequently entered a second Order on May 19, 1995, granting the Motion of Defendant,

First American Bulk Carrier Corporation, et.al. ("FABC"), to extend the discovery deadline to June 30, 1995. In the interim, the Court received a letter brief from Plaintiff, Ambassador Factors, in support of the position that it took at the most recent status conference in this proceeding, held April 11, 1995, that one of the issues remanded to this court by the district court had actually been resolved by one of this court's previous orders. For the reasons that follow, the Court rejects the Plaintiff's contention.

On May 3, 1995, Ambassador Factors Corporation filed a letter brief addressing the issue of "whether the freights of the last voyage of the M/V DELAWARE BAY are subject to Ambassador's security interest," which Judge Nangle remanded to this court for "specific findings." Matter of Topgallant Lines, Inc., 154 B.R. 368, 383 (S.D.Ga. 1993). Ambassador essentially contends that this issue has already been resolved adversely to FABC in the three orders that this court entered on the parties' cross-motions for summary judgment. Ambassador bases this contention on the fact that FABC failed to either (1) assert its interest in the freights derived from the final voyage of the M/V DELAWARE BAY as a compulsory counterclaim or (2) present sufficient evidence on the issue in response to Ambassador's summary judgment motion, and thus, according to Ambassador, any claim FABC might have had to these freights was extinguished by the orders, subsequently affirmed by the Eleventh Circuit, that this court entered in this proceeding.

This court entered three different orders on the parties' motions for summary

judgment. In the first order, entered February 4, 1991, I held that valid maritime liens are superior in priority to perfected non-maritime U.C.C. security interests and that the validity of a U.C.C. security interest is not affected by failure to comply with the Assignment of Claims Act. Matter of Topgallant Lines, Inc., 125 B.R. 682 (Bankr. S.D.Ga. 1991). In my Findings of Fact, I noted that "there is some dispute whether FABC affirmatively terminated the charters on or before December 13, 1989, or whether FABC and the Debtor had mutually agreed to operate under the terms of the charters after that date." Id. at 683.

The court's second order, entered July 16, 1991, dealt exclusively with Ambassador's motion for summary judgment. In it, I held that "as a matter of law, Ambassador Factors holds a valid perfected UCC security interest under both Georgia and New Jersey law in the collateral specifically described in those documents including freights." Ambassador Factors Corp. v. First American Bulk Carrier Corp., (Matter of Topgallant Lines, Inc., Adv. No. 90-4072, Ch. 7 No. 89-41996, slip op. (Bankr. S.D.Ga. July 16, 1991). (Unpublished). It is clear, however, that I did not endeavor in that order to resolve the question of whether Ambassador's security interest extended to the freights earned by the M/V DELAWARE BAY on its last voyage (i.e., whether Debtor, rather than FABC, earned the freight from that voyage).

Finally, in the third order on the parties' cross motions, entered February 5, 1992, I concluded that maritime lien claimants who had accepted security (ie. letters of

acceptance or guarantees) in lieu of seizure of vessels, had lost their maritime liens; that FABC could not be subrogated to the rights of maritime lien claimants that it had satisfied; and finally, that FABC could not hold a maritime lien in its own vessel. Matter of Topgallant Lines, Inc., 138 B.R. 314 (Bankr. S.D.Ga. 1992). Again, I made no attempt to explicitly resolve the issue of who, between the Debtor and FABC, earned the freights from the M/V DELAWARE BAY's final voyage.

The question, then, is whether the issue was, as Ambassador contends, implicitly resolved in one or more of these three orders, or whether, as FABC contends, it is an issue that was not raised on summary judgment and therefore remains to be resolved. A fundamental precept of UCC law is that a creditor's security interest cannot attach to property until the debtor has rights in that property. *See* O.C.G.A. §11-9-203(1)(c). Thus, if, as FABC contends, it effectively terminated Debtor's sub-bareboat charter in the M/V DELAWARE BAY prior to the vessel's final voyage, then Debtor could not have earned the freights derived therefrom and Ambassador would not have a security interest in that portion of the freights. Because this is a fact specific question (i.e., did FABC timely terminate the charter, or did the parties agree to extend the charter), that neither party specifically dealt with in their motions for summary judgment, and because the court has not explicitly resolved it in any prior order, it is an issue that would appear to have survived summary judgment and is now ready to be tried.

Ambassador argument is not, however, without force. Both its Complaint and initial Motion for Summary Judgment contain expansive language that could arguably encompass this issue. Ambassador's Complaint requests the following relief:

Wherefore, Plaintiff demands judgment that Plaintiff's security interest in *all of Topgallant's accounts* is valid and perfected and has priority over all other claims and interests to the full extent of the secured indebtedness including interests and all fees, costs and other charges provided for in 11 U.S.C. §506(b). (emphasis added)

The most notable aspect of Ambassador's prayer is that it only seeks judgment with respect to Topgallant's accounts, and if FABC's allegations are true, then the freights in question would not be Topgallant's accounts - Topgallant not having earned them.

FABC does not raise the issue of the M/V DELAWARE BAY's final voyage in its Answer; asking the court instead to enter judgment declaring that:

Plaintiff's claim to a consensual security interest, even if valid and perfected under the Uniform Commercial Code, is (i) inferior to any maritime liens on freights that may be held by FABC and other creditors; and (ii) unenforceable with respect to freights and other sums payable by the United States because of Plaintiff's failure to comply with the requirements of the Federal Assignment of Claims Act . . .

On September 5, 1990, FABC filed its Motion for Partial Summary Judgment, seeking an order declaring that (1) the maritime liens on freights have priority

over consensual non-maritime security interests therein; and (2) the collateral assignments of claims against the United States are unenforceable in bankruptcy if they were prohibited by the Federal Assignment of Claims Act at the time the bankruptcy petition was filed. (Doc. No. 143).

On September 14, 1990, Ambassador Factors filed its Motion for Summary Judgment, seeking judgment that (1) Ambassador Factors has a valid, perfected security interest in the freights of the M/V Chesapeake Bay and the M/V Delaware Bay as against the debtor-in-possession and all other creditors; (2) FABC has no lien or other claim to freights of the M/V Chesapeake Bay or the M/V Delaware Bay; (3) money paid Topgallant, Inc., or one of its agents, is not subject to a maritime lien; (4) the maritime lien claims of creditors are limited to freights earned on the specific voyage for which each carrier furnished supplies or rendered services; and (5) Ambassador Factors' security interest in the Debtor's accounts, including freights, has priority over all conflicting liens. (Doc. No. 163).

In its Statements of Undisputed Material Facts submitted in support of its summary judgement motion, FABC alleges that "on December 13, 1989, FABC affirmatively terminated the charters, which had already expired by their own terms, and the Debtor and Group filed in this Court voluntary petitions for relief under Chapter 11 of the Bankruptcy Code." (Doc. No. 143). Ambassador disputes this assertion in its response to FABC's Motion for Summary Judgment, stating that "FABC and the Debtor had mutually

continued to operate under the terms of the charters and agreed to be bound thereby after the date otherwise specified for termination." Finally, FABC in its response to Ambassador's Motion for Summary Judgment states that "FABC does not dispute for the purposes of [Ambassador's] Motion, the facts alleged in paragraph 7 of the statement except that FABC disputes that certain freights earned after FABC took control of the vessels theretofore operated by the Debtor were earned by the Debtor." (Doc. No. 167).

Thus, according to Ambassador, the scope of its Complaint and initial Motion for Summary Judgment is sufficiently broad to encompass the issue of whether its security interest extends to the freights in question, and that the issue was resolved when the court concluded in its order of July 17, 1991, that it holds a valid and perfected security interest in the collateral described in the relevant documents. I remain unconvinced. It is important to remember that Ambassador is the Plaintiff in this proceeding and it is seeking a determination of the validity, extent and priority of its lien(s) in Debtor's assets. It is, therefore, Ambassador's burden as the Plaintiff to prove the extent of its lien by a preponderance of the evidence, which requires it to prove by a preponderance of the evidence that Debtor, rather than FABC, earned the freights in question because it's lien could not otherwise attach. Following is a procedural summary of the record to date:

- (1) Ambassador, as Plaintiff in this action, bears the burden of proving the extent of its lien, which burden encompasses the issue of whether Debtor earned the freights in

question.

- (2) Neither party presented any substantive evidence on that issue either in support of, or in opposition to, their motions for summary judgment. Both simply made unsupported statements in their Statement of Material Facts.
- (3) There is no question that the issue was disputed in the parties' Statement of Material Facts. FABC clearly put the question of whether Debtor earned the freights in issue, and Ambassador never offered any substantive evidence piercing FABC's assertions in its Statements.
- (4) Finally, the court never ruled on the issue. The closest the court came was the July 16, 1991, Order in which the court held that Ambassador holds a valid perfected security interest. The court did not, however, reach any conclusions or make any findings as to what collateral was covered by Ambassador's security interest. In fact, the court explicitly noted in its first order that the issue of who earned the freights was disputed, and the two orders following it never explicitly resolved the issue.

In sum, Ambassador bore both the burden of proof and the burden of demonstrating its entitlement to summary judgment; the issue was clearly disputed on a

factual basis and therefore was not ripe for summary judgment; and the court never explicitly ruled on the issue. FABC may indeed have been required to assert its claim to the Debtor's freights as a compulsory counterclaim, but this does not relieve Ambassador of its burden of proving its security interest in the Debtor's freights. Based upon this state of facts, it is the court's opinion that the issue remains unresolved and ripe for trial. Accordingly, IT IS THE ORDER OF THIS COURT that the issue of "whether the freights of the last voyage of the M/V DELAWARE BAY are subject to Ambassador's security interest," remanded to this court for "specific findings," remains unresolved and will be set for trial following the close of discovery.

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Lamar W. Davis, Jr.  
United States Bankruptcy Judge

Dated at Savannah, Georgia

This \_\_\_\_ day of June, 1995.