

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

In the matter of:

RICK TAYLOR TIMBER  
COMPANY, INC.  
(Chapter 11 Case 92-50324)

*Debtor*

RICK TAYLOR TIMBER  
COMPANY, INC.

*Plaintiff*

v.

ORIX CREDIT ALLIANCE, INC.  
and  
THE FIRST NATIONAL  
BANK OF ALMA

*Defendants*

AND

JOHN DEERE INDUSTRIAL  
EQUIPMENT COMPANY

*Movant*

v.

RICK TAYLOR TIMBER  
COMPANY, INC.

Adversary Proceeding

Number 92-5038

**MEMORANDUM AND ORDER**

The Debtor, Rick Taylor Timber Company, Inc., filed a Chapter 11 petition on June 9, 1992. Orix Credit Alliance, Inc. ("Orix") and John Deere Industrial Equipment Company ("John Deere") filed Motions for Relief from Stay on certain equipment, which the Debtor uses in its business. A hearing on the motions was held on September 17, 1992, at which time I granted Orix's motion as to one piece of equipment and took the Orix motion on another piece of equipment and the John Deere motion under advisement. Subsequently, the Debtor filed an adversary proceeding against Orix and First National Bank of Alma ("Bank"). A pre-trial conference was held on December 7, 1992. With the agreement of the parties, the court concluded that the effect of a bill of sale, which allegedly gave the Debtor an interest in the equipment at issue, would be a primary issue in the adversary as well as the two motions for relief already under advisement.

By order filed December 22, 1992, the court informed the parties that the motions for relief would be decided with the trial of the adversary. As the adversary proceeding and the motions for relief may be resolved by an order consolidating the motions for relief and the Motion for Summary Judgment, I now enter an order deciding all issues between the above-named parties. Upon consideration of the evidence adduced at the September 17, 1992, hearing, the briefs, affidavits and documentation submitted by the parties and the applicable authorities, I make the following Findings of Fact and Conclusions of Law.

## FINDINGS OF FACT

Debtor, Rick Taylor Timber Company, Inc., filed a Chapter 11 bankruptcy petition on June 9, 1992. The Debtor corporation is owned and operated by Rick Taylor. Previously Taylor and Wendell R. Medders as partners operated M & T Logging Company. This company was incorporated as M & T Logging Company, Inc., in 1984.

On May 7, 1990, Rick Taylor and Wendell Medders individually, and as partners d/b/a M & T Logging, purchased a feller buncher from Industrial Tractor Company ("Industrial"). The conditional sales contract granted Industrial a security interest in the "property and any and all inventory, goods, equipment, machinery, general intangibles . . . now or hereafter belonging to buyer" to secure all obligations "now existing and/or hereafter incurred." *See Exhibit "A"* attached to Motion for Summary Judgment filed by Defendant Orix. The agreement further provides that buyer shall not sell the property without prior written consent of the seller and that buyer shall maintain insurance with loss payable to seller. Specifically, the buyer agreed:

[t]o keep the property insured, at buyer's expense, against loss or damage by fire, theft, collision (if appropriate) and such risks as are customary, in amount, form, coverage and insurer satisfactory to Holder, with loss payable to Holder as its interest may appear, such policies to be delivered to Holder . . . Buyer hereby irrevocably appoints Holder as Buyer's attorney-in-fact to make claim for, reserve payment of and execute and endorse all documents, checks or drafts received in payment of loss or damage under any insurance.

This conditional sales contract was assigned to Orix on May 7, 1990. A financing statement on this property was filed on July 9, 1992, post-petition, in the name of "Ricky C. Taylor and

Wendell R. Medders, d/b/a M & T Logging." *See* Exhibit "F". The amount due on the Feller Buncher contract was \$38,069.74 as of June 9, 1992, the date Debtor filed bankruptcy. *See* Affidavit of William Bagby attached to Defendant's Motion for Summary Judgment filed March 16, 1993.

On March 13, 1992, Ricky C. Taylor, individually, entered into a conditional sales contract with Rimes Tractor and Equipment, Inc., to purchase a log loader. *See* Exhibit "C" attached to Defendant's Motion. This contract employs the same standard form as the Industrial Tractor agreement, granting a security interest, prohibiting sales, and requiring insurance. This agreement was assigned to Orix on March 13, 1992. A financing statement was filed in the name of "Ricky C. Taylor" on March 20, 1992. *See* Exhibit "E". The court granted relief from the automatic stay as to the log loader at the September 17, 1992, motion for relief hearing.

On April 11, 1991, M & T Logging, Inc., purchased a skidder and other items from Reliable Tractor, Inc. *See* Loan Contract-Security Agreement, Composite Exhibit "1" attached to transcript of September 17, 1992, hearing. As noted in the agreement, John Deere provided the financing for the purchase. The agreement provides that any attempt to sell the property is a basis for declaring default. The agreement is signed on behalf of M & T Logging, Inc., by Wendell Medders, President, and Wendell Medders, Individually. Rick Taylor signed his name beneath Medders' two signatures. This security interest was subsequently perfected. *See* Motion for Relief filed September 1, 1992. Thereafter on January 23, 1992, M & T Logging, Inc., allegedly conveyed the skidder to Debtor.

John Deere filed a motion for relief, which was heard at the September 17, 1992, hearing. A dispute arose at that hearing concerning the extent, if any, of Debtor's interest in the property. Taylor testified that he had informed John Deere of the transfer to the Debtor and that John Deere had no objection to the change. Transcript. pp.41-42. John Deere disputed this testimony arguing that Taylor spoke to a representative that did not have authority to approve the transfer to Debtor and that no written documents were ever signed by John Deere or Taylor reflecting the change. Transcript p.42. The motion for relief was taken under advisement and later addressed in the court's order of December 22, 1992, in which the court informed John Deere that it's motion would be decided contemporaneously with the adversary proceeding.

On or about January 23, 1992, Rick Taylor and Wendell Medders divided the property used in their business and signed a bill of sale transferring certain property including the feller buncher claimed by Orix and the skidder claimed by John Deere, to Debtor, Rick Taylor Timber Company, Inc. The bill of sale recites that:

WE THE UNDERSIGNED, HEREBY SELL, SETOVER,  
AND ASSIGN ALL RIGHTS, TITLE, AND INTEREST  
IN AND TO THE FOLLOWING PROPERTY . . . TO:  
RICK TAYLOR TIMBER COMPANY, INC., IN FEE  
SIMPLE TITLE. (BUYER).

*See* Exhibit "P-5" attached to Transcript of September 17, 1992, hearing. This agreement is signed by Medders and Taylor with the notation, "M & T Logging, Inc. (SELLER)" beneath the signatures.

On January 23, 1992, Debtor, Rick Taylor Timber Company, Inc., entered into an agreement with First National Bank of Alma ("Bank"), in which the Bank obtained a security interest in the feller buncher and other equipment owned by Debtor. *See* Exhibit "A," Security Agreement, attached to Defendant First National Bank of Alma's Brief filed April 15, 1993. In the agreement, Debtor agrees to keep the property insured and agrees that:

[I]t will at all times keep the goods insured against loss, damage, theft, and other risks, in such amounts and companies and under such policies and in such form, all as shall be satisfactory to the Bank, which policies shall provide that loss thereunder shall be payable to the Bank as its interest may appear (and the Bank may apply any proceeds of such insurance which may be received by it toward payment of the liabilities, whether or not due, in such order of application as the Bank may determine) and such policies or certificates thereof shall, if the Bank so requests, be deposited with the Bank.

*See* Page "1" of Security Agreement. The Bank filed a financing statement on January 29, 1992. *See* First National Bank, Exhibit "1" attached to Transcript of September 17, 1992, hearing.

On or about August 29, 1992, the feller buncher burned. At the September 17, 1992, hearing Debtor produced an insurance check in the amount of \$55,775.00, payable to Debtor and Orix Credit Alliance. The Bank claims the check as does Orix. Debtor filed the adversary proceeding against the Bank and Orix to determine the extent, validity and priority of the liens asserted by the Bank and Orix.

Rick Taylor testified that he and Medders intended to convey all their

individual interests in the equipment and any interests of M & T Logging, Inc., by the bill of sale. Taylor testified that he informed Orix of the transfer by talking to an Orix representative in Florida. *See* Transcript p.66. An Orix official from Atlanta denied giving approval for the transfer. *See* Transcript pp.54-56. The Debtor introduced into evidence certain invoices from Orix addressed to "Rick Taylor Timber Company." *See* Invoice dated January 15, 1992, Exhibit "D-4" attached to Transcript of September 17, 1992, hearing, and Invoice dated June 15, 1992, Exhibit "D-5" attached to Transcript. These invoices reflected payments due on Debtor's account and Orix's knowledge that the account had been transferred to another entity.

The Debtor used the equipment, made payments on the equipment, and obtained insurance on the equipment. Orix received at least four payments from Debtor on the "Rick Taylor Timber Company" bank account. *See* Exhibits "D-6 through D-9" attached to the Transcript of the September 17, 1992, hearing. Debtor maintained insurance coverage on the equipment. *See* Certificate of Insurance, Exhibit "G" attached to Defendant's Motion for Summary Judgment. The certificate of insurance lists Orix as loss payee on the loader and the feller buncher. First National Bank of Alma is listed loss payee on the 1989 John Deere Skidder.

Orix claims that the bill of sale was ineffective to convey the individual interests of Medders and Taylor, and thus, Debtor could not have any interest in the feller buncher which was originally sold to Medders and Taylor, individually and as partners. Orix argues that the sale to Debtor violated the terms of the security agreement and is a nullity. Debtor asserts the validity of that transfer and that Orix's unperfected security interest should

be avoided under 11 U.S.C. Section 544. John Deere argues that the sale of its secured property constituted a conversion entitling it to the return of its property.

In opposition to Orix and John Deere, the Bank argues that the bill of sale is ambiguous and that parol evidence should be considered in order to determine the intent of the parties. The Bank further argues that Debtor used, insured, and paid for the feller buncher meeting the Uniform Commercial Code requirements of a sale under O.C.G.A. Section 11-2-201(3)(c). Debtor and Bank argue that the Uniform Commercial Code explicitly authorizes the sale of secured collateral in O.C.G.A. Section 11-9-306(2). At the December 7, 1992, pre-trial conference the parties and the court agreed to incorporate the record of the September 17, 1992, Motion for Relief hearing as part of the record in the adversary proceeding.

On May 11, 1993, the court held a hearing on the United States Trustee's Motion to Convert Debtor's Chapter 11 case to a Chapter 7 case. Debtor had no opposition to the Motion. Subsequently, the case was converted. The court finds that the conversion does not render moot the issues in the adversary proceeding, although the Motion for Relief filed by John Deere will be moot after Debtor's Chapter 7 discharge is entered.

#### CONCLUSIONS OF LAW

Bankruptcy Rule 7056 incorporates F.R.Civ.P. 56 which provides that summary judgment "shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there

is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." F.R.Civ.P. 56(c).

The moving party bears the initial burden of showing the absence of any genuine issue of material facts. Bald Mountain Park, Ltd. v. Oliver, 863 F.2d 1560 (11th Cir. 1989). The movant should identify the relevant portions of the pleadings, depositions, answers to interrogatories, admissions, and affidavits to show the lack of a genuine issue of material fact. Celotex Corp. v. Catrett, 477 U.S. 317, 323, 106 S.Ct. 2548, 2553, 91 L.Ed. 265 (1986). The moving party must support its motion with sufficient evidence to show that the facts are not in dispute. United States v. Twenty (20) Cashiers's Checks, 897 F.2d 1567, 1569 (11th Cir. 1990). Once the movant has carried its burden of proof, the burden shifts to the non-moving party to demonstrate that there is sufficient evidence of a genuine issue of material fact. United States v. Four Parcels of Real Property, 941 F.2d 1428, 1438 (11th Cir. 1991). The non-moving party must come forward with some evidence to show that a genuine issue of material fact exists. United States v. Four Parcels of Real Property, 941 F.2d at 1438. The trial court must consider the evidence in the light most favorable to the non-moving party. Rollins v. TechSouth, Inc., 833 F.2d 1525, 1528 (11th Cir. 1987). After considering the evidence I conclude, and the parties do not appear to dispute, that there is no genuine issue of material fact and that this case can be decided as a matter of law.

#### I. Bill of Sale

On January 23, 1992, Rick Taylor and Wendell Medders signed a bill of sale which allegedly conveyed to the Debtor an interest in the feller buncher, skidder and other equipment. The bill of sale recites that "WE THE UNDERSIGNED, HEREBY SELL . . .

property" (emphasis added). The bill of sale is signed by Medders and Taylor with "M & T Logging, Inc. (SELLER)" typed below the signatures.

Under Georgia law, extrinsic evidence is not admissible to contradict the terms of an unambiguous written contract. Peterson v. Lexington Ins. Co., 753 F.2d 1016, 1018 (11th Cir. 1985). *See* O.C.G.A. §24-6-1. Extrinsic evidence may not be admitted to establish the existence of an ambiguity; the ambiguity must be evident from the language of the contract alone. Orkin Exterminating Co., Inc. v. FTC, 849 F.2d 1354, 1362-63 (11th Cir. 1988), cert. denied, 488 U.S. 1041, 109 S.Ct. 865, 102 L.Ed. 2d 989 (1989); Southern Stone Co., Inc. v. Singer, 665 F.2d 698 (5th Cir. 1982).

If an ambiguity appears from the face and language of a contract, extrinsic evidence is admissible to explain the ambiguity. Orkin Exterminating Co., 849 F.2d at 1362. *See also* O.C.G.A. §24-6-3(b). An ambiguous contract is one which is "reasonably susceptible to more than one interpretation." Stewart v. KMD Deutz of America Corp., 980 F.2d 698 (11th Cir. 1993). *See also* Contractors Management Corp. v. McDowell-Kelley, Inc., 136 Ga. App. 116, 220 S.E.2d 473, 476 n.2 (1975) (A contract is ambiguous if it "may fairly be understood in more ways than one").

The bill of sale attempts to convey the interests of "we the undersigned." The use of "we", a personal pronoun, refers to natural persons and not a corporate entity. *See generally* Yeomans v. Coleman, Meadows, Pate Drug Company, 167 Ga. App. 646, 307 S.E.2d 121 (1983) (Use of "I" refers to a natural person and not a corporation or business). The bottom of the contract refers to the seller as "M & T Logging, Inc.", a corporation.

Thus, I conclude that the contract is ambiguous as one cannot determine whether the parties intended to convey personal interests, corporate interests, or both. Therefore, on these facts parol evidence is admissible to determine the intent of the parties.

Rick Taylor testified that he and Medders were ending their business relationship and planned to divide the property used in their business. Some of the property was owned by one or both individually and other property was owned by the corporation M & T Logging, Inc. Taylor testified that he and Medders intended the bill of sale to convey all their interests, personal and corporate, to the Debtor, Rick Taylor Timber Company, Inc., so that Taylor could begin his own business. This evidence was uncontradicted.

I conclude that the bill of sale was effective to convey the interests of Medders and Taylor, individually, and the interests of M & T Logging, Inc., in all the listed equipment to the Debtor. Taylor's testimony is bolstered by the fact that he notified Orix of the sale as reflected by the invoices mailed to Rick Taylor Timber Company, Inc. Orix also received payment on the Debtor's business checking account. Debtor assumed payment on all pieces of equipment conveyed by the sale and maintained insurance on the Feller buncher as required in the original sales contract. Thus, Debtor, at the time of filing the petition, held a valid interest in the equipment which became part of the estate subject to the security interests and limitations discussed below.

## II. Perfection of Security Interests, Priority and Proceeds

### A. Orix and Bank

Under O.C.G.A. Section 11-9-302, a secured party must file a financing

statement in order to perfect an interest in goods such as the equipment at issue here. Further, where two perfected secured creditors claim a security interest in certain property the first to file a financing statement has priority. *See* O.C.G.A. §11-9-312.

Orix filed a financing statement in certain equipment post-petition. That filing did not perfect its interest in the Feller buncher for two reasons. First, the financing statement was filed in the name of an entity which had already transferred the property to Debtor. Second, as Debtor's Chapter 11 case had been filed the effort to perfect any interest in Debtor's collateral is void under 11 U.S.C. Section 362(a)(5). Orix also claims that its security agreement on the log loader containing a dragnet clause gave it an interest in all of Rick Taylor's property including the Feller buncher. However, the log loader was purchased by Rick Taylor, individually, in March, 1992, after the January transfer of the Feller buncher to the Debtor. As a result, the dragnet clause in the security agreement did not attach to the feller buncher which had already been sold to the Debtor corporation.

The Bank perfected its security interest in the Feller buncher by filing a UCC-1 financing statement on January 29, 1992, in the name of Rick Taylor Timber Company, Inc. *See* First National Bank Exhibit "1". First National Bank of Alma has the only perfected security interest in the Feller buncher, despite the language in the Orix security agreement which prohibits sale of the equipment.

Accordingly, the Bank claims the insurance check for the destroyed feller buncher as proceeds of its security interest. Under O.C.G.A. Section 11-9-306(1) proceeds includes insurance "payable by reason of loss or damage to the collateral . . . except to the

extent that it is payable to a person other than a party to the security agreement." The ultimate question, then, is whether the insurance check belongs to the Bank as proceeds or to Orix, even though its claim is unsecured, because of Orix' interest as loss payee of the policy.

Prior to the amendment to U.C.C. Section 9-306, numerous courts relying on U.C.C. Section 9-104(g) concluded that all insurance, even insurance received as proceeds upon destruction of the collateral, was excluded from Article 9 coverage. *See generally In re Bell Fuel Corp.*, 99 B.R. 602, 606 (E.D.Pa. 1989). Thereafter, Section 9-306 was amended in 1972 to specifically include as proceeds insurance received upon destruction of collateral. Official comment "1" to U.C.C. Section 9-306 states that the amendment "makes clear that insurance proceeds received from casualty loss of collateral are proceeds . . . "

U.C.C. Section 9-104(g) provides that Article 9 does not cover:

[A] transfer of an interest in or claim in or under any policy of insurance, except as provided with respect to proceeds (Section 9-306) and priorities in proceeds (Section 9-312).

O.C.G.A. §9-104(g). The courts construing Section 9-104(g) have concluded that the exception for insurance applies where the "security agreement attempt[s] to create a direct security interest in an insurance policy by making the policy itself the immediate collateral securing the transaction." *PPG Industries, Inc. v. Hartford Fire Ins. Co.*, 531 F.2d 58 (2nd Cir. 1976). Thus, the courts have distinguished an original security interest in an insurance

policy from an interest in insurance claimed merely as proceeds of the destroyed collateral, a derivative interest. *See also* In re Tyson Metal Products, Inc., TAFCO, 117 B.R. 181, (Bankr. W.D.Pa. 1990); In re Kroehler Cabinet Co., Inc., 129 B.R. 191 (Bankr. W.D.Mo. 1991).

In this case Orix has an "original" interest in the insurance policy arising out of its having been named loss payee and as such, the validity of its interest is not subject to Article 9. The Bank's interest in the policy, however, is a derivative interest because it never obtained an endorsement to Debtor's policy naming Bank as loss payee. As a derivative interest, the priority of Bank's claim is governed by the Uniform Commercial Code, which as noted above, has been amended to include insurance as proceeds with one major exception: "to the extent . . . payable to a person other than a party to the security agreement." The Code and comments do not completely explain the "except . . . payable" to another person phrase. The language appears to be derived from the exclusions of Section 9-104(g) and aimed at preventing a party from obtaining insurance as proceeds where another party is named as loss payee, or otherwise holds an "original" interest in the policy.

Under the express terms of Section 9-306(1) the Bank's interest in proceeds is limited to the extent those proceeds are payable to a non-signatory of the security agreement (that is the security agreement between Debtor and the Bank). Thus to the extent the insurance is payable to Orix, "a person other than a party to the security agreement," the Bank has no proceeds interest as defined in the Code. Moreover Orix' failure to perfect its security interest is not fatal because its interest as loss payee is not governed by Article 9.

As stated by the court in Matter of Rogers, 6 B.R. 472 (Bankr. S.D. Iowa 1980):

If the UCC does not apply, [a creditor] cannot create a security interest in . . . insurance . . . unless an interest can be established under some other statute or the common law.

Id. at 474.

That "other" interest has been recognized where a creditor has been named as loss payee on a policy. In In re Thrasher, 21 UCC Rep. Serv. 1420 (Bankr. E.D.Tenn. 1977), the court concluded that being named loss payee was tantamount to an assignment and that a UCC filing was unnecessary. The court found the UCC inapplicable in ruling that the creditor's interest in insurance proceeds of destroyed collateral was superior to the claims of the trustee in bankruptcy. See In re Larymore, 82 B.R. 409 (Bankr. S.C. 1987), cited by Orix, for the assertion that a creditor named as loss payee in an insurance contract had priority over perfected secured creditors despite failure to perfect its security interest. See also Paskow v. Calvert Fire Ins. Co., 579 F.2d 949 (5th Cir. 1978) (As against the government asserting tax lien, creditor, which required debtor to maintain insurance in its favor, had a superior equitable lien on insurance proceeds under Florida law); Matter of Rutherford, 73 B.R. 465 (Bankr. W.D.Mo. 1986) (Where debtor promised to make creditor loss payee of insurance policy and failed to do so, creditor had superior equitable lien in insurance proceeds despite failure to file financing statement).

This case is similar to the cases discussed above. Orix obtained a

contractual promise from Debtor's predecessor in interest to keep the collateral insured. Debtor assumed the obligation and kept the promise by maintaining the required insurance and naming Orix as loss payee. The insurance company issued a certificate of insurance naming Orix as loss payee on the feller buncher. I conclude that Orix, named as loss payee, has a superior claim upon the insurance proceeds.

The Bank obtained a subsequent contractual promise from Debtor to keep the collateral insured. However, the Bank failed to make sure that it was named loss payee of the insurance policy. Despite the Bank's failure to enforce its loss payee status, since the insurance check exceeds the balance of the debt on the feller buncher, such excess is not "payable to another person" and, therefore constitutes proceeds under U.C.C. Section 9-306(1), to which the Bank is entitled under the terms of its security agreement and financing statement.

#### B. John Deere

John Deere in prosecuting its motion for relief from stay argued that the sale of the equipment subject to its perfected security interest constituted a conversion of the property. According to John Deere, Debtor has no interest in the equipment and should not be protected by the automatic stay. The loan contract and security agreement provides that any sale of the equipment would constitute a default. John Deere further argues that the sale of the property gives the creditor the right of trover for return of the property, or alternatively, the right to seek money damages for the value of the security interest converted. John Deere cites the general rule from tort law that one who acquires property by conversion cannot obtain good title to the property sold. The authorities cited for support

of this conversion theory include Privitera v. Addison, 190 Ga.App. 102 (1989); Trust Co. v. Associated Growers Co-op Inc., 152 Ga.App. 701 (1979); and Rose City Foods, Inc. v. Bank of Thomas County, 207 Ga. 477 (1950).

The Debtor disputes John Deere's analysis of the transfer to the Debtor and argues that property, subject to a security interest, including any security interest that prohibits sale or makes such a sale a default, may be sold and conveyed to a buyer under the Uniform Commercial Code. Debtor specifically cites O.C.G.A. Section 11-9-311 which provides as follows:

The debtor's rights in collateral may be voluntary or involuntarily transferred (by way of sale, creation of a security interest, attachment, levy, garnishment, or other judicial process) notwithstanding a provision in the security agreement prohibiting any transfer or making the transfer constitute a default.

O.C.G.A. §11-9-311. John Deere's contract provides that any sale of the collateral shall constitute a default of the contract. However, the Uniform Commercial Code makes clear that property may be conveyed despite a clause prohibiting transfer. In light of the Uniform Commercial Code provision which is directly on point, I conclude that the Debtor's position is correct.

Under O.C.G.A. Section 11-9-306(2):

[A] security interest continues in collateral notwithstanding sale, exchange, or other disposition thereof unless the disposition was authorized by the

secured party in the security agreement or otherwise, and also continues in any identifiable proceeds including collections received by the debtor.

O.C.G.A. §11-9-306(2). Taylor testified that John Deere knew and approved of the transfer. However, Taylor's testimony did not prove that any John Deere representative with authority authorized the sale to Debtor. Although John Deere may not have previously objected to the sale and may have received payments from Debtor's business checking account, such possible notice of the transfer and failure to object does not, under these circumstances, constitute authorization under O.C.G.A. Section 11-9-306(2). See Matter of Guaranteed Muffler Supply Co., Inc., 1 B.R. 324 (Bankr. N.D.Ga. 1979); In re Environmental Electronic Systems, Inc., 2 B.R. 583 (Bankr. N.D.Ga. 1980). Thus, John Deere's perfected security interest in the skidder continues despite the transfer to the Debtor. Debtor acquired the property through a valid transfer and has not acted in a way inconsistent with the rights of the security party; instead, the Debtor recognized the security interest and has attempted to pay in accordance with the contract.

At the September, 1992, hearing, Debtor was ordered to make adequate protection payments to John Deere in the interim until the motion for relief was decided. Further, the court informed Debtor that the motion for relief would be granted without another hearing if Debtor failed to make the adequate protection payments in compliance with the court's instructions. As of the December 7, 1992, pre-trial hearing, Debtor's adequate protection payments were current.

I conclude that John Deere cannot recover on a conversion theory and that

its motion for relief should be denied. Debtor is required to continue the adequate protection payments to John Deere under a strict compliance order as previously announced by the court. However, the Motion will be moot at the time Debtor's Chapter 7 discharge is entered.

### III. Conclusion

Defendant Orix' Motion for Summary Judgment is granted to the extent of its balance due on the date of filing or \$38,069.74, representing its interest in the proceeds as of the date of the loss (or the date nearest the date of loss that can be gleaned from the record). The balance is unencumbered by any claim of Orix and is payable to the Bank as proceeds of its security interest.

### ORDER

Pursuant to the foregoing Findings of Fact and Conclusions of Law, IT IS HEREBY THE ORDER OF THIS COURT that Defendant, Orix Credit Alliance, is entitled to \$38,069.74 of the funds held in the Court's Registry.

IT IS FURTHER ORDERED that Defendant, First National Bank of Alma, is entitled to payment of the balance in the Registry after payment to Orix.

Judgment in favor of Orix in the adversary proceeding moots its Motion for Relief from Stay pending in Debtor's bankruptcy case. The Motion for Relief filed by John

Deere is denied and Debtor IS ORDERED to make adequate protection payments under the previous order of this court. This order shall be entered in the above-captioned adversary proceeding and in Debtor's Chapter 7 bankruptcy proceeding.

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Lamar W. Davis, Jr.  
United States Bankruptcy Judge

Dated at Savannah, Georgia

This \_\_\_ day of June, 1993.