

IN THE UNITED STATES BANKRUPTCY COURT

FOR THE

SOUTHERN DISTRICT OF GEORGIA
Augusta Division

IN RE:)
)
LEASE PURCHASE CORPORATION)
)
Debtor)
_____)

Chapter 7 Case
Number 87-11177

JAMES D. WALKER, JR., TRUSTEE FOR))
LEASE PURCHASE CORPORATION,))
VELSTAR ENTERPRISES, INC.,))
JOHN GINN ENTERPRISES, INC.))
MIG INVESTMENT CO., INC.,))
RAY MORRIS HOUSING CENTER, INC.,))
CHARLES FLANDERS HOMES, INC.,))
BOB WRIGHT HOMES, INC.,))
VELSTAR INSURANCE AGENCY, INC.,))
HARRY LUCAS HOMES, INC.,))
HUTCHINSON HOMES, INC.,))
WREN HOMES OF AUGUSTA, INC.,))
HUTCHINSON HOMES OF THOMSON,))
WREN HOMES OF THOMSON, INC.,))
BOB WRIGHT ENTERPRISES, INC.,))
TERRY STULL HOUSING CENTER, INC.,))
BILL KINLAW HOUSING CENTER, INC.,))
RALPH SCURRY HOMES, INC.,))
HUTCHCO LEASING CORP., INC.,))
NEW ENVIRONS OF SC, INC.,))
RAY RADFORD HOMES, INC.,))
HUTCHINSON HOMES OF SC, INC.,))
TOWN & COUNTRY HOMES, INC.,))
TOWN & COUNTY HOMES,))
MARSHALL KING HOMES, INC.,))
EARL LOWE HOUSING CENTER INC.,))
J. R. GOSNELL HOMES, INC.,))
WARNER ROBBINS HOUSING CENTER,))
PEGGY'S MOBILE HOMES, INC.,))
GARY SMOAK HOUSING SHOWPLACE,))
GREENWOOD HOUSING CENTER, INC.,))

FILED
at 4 O'clock & 44 min. P.M.
Date: 9-29-93

FIRST QUALITY HOUSING CENTER,)
INC., GLENN MANNING HOMES, INC.,)
JERRY SIMPKINS HOMES, INC.,)
TONY BRUNSON HOMES, INC.,)
ED EDWARDS HOMES, INC.,)
CHARLES RAGAN HOMES, INC.,)
LARRY FISCHER HOMES, INC.,)
LARRY SHORT HOMES, INC.,)
RAY SOLLIE HOMES, INC.,)
BOB BRUNSON HOMES, INC., AND)
JIMMY PHILLIPS HOMES, INC.)

Plaintiff)

vs.)

CIT FINANCIAL SERVICES)
CORPORATION AND CIT GROUP/)
SALES FINANCING, INC.)

Defendants)

Adversary Proceeding
Number 90-1092

ORDER

Plaintiffs in the above captioned adversary proceeding have filed a motion requesting that this Court enter a temporary restraining order, preliminary injunction, and permanent injunction requiring that the defendant, CIT Group\Sales Financing as successor to CIT Financial Services Corporation ("CIT"), cease setting off or utilizing dealer reserve accounts without obtaining relief from the automatic stay of 11 U.S.C. § 362 and further requesting that the dealer reserve account funds be paid into the Register of the court or to the Trustee. This motion came on for hearing on March 22, 1993 at which time I denied plaintiffs' motion as to the temporary restraining order, but took the matter of issuance of a preliminary injunction under advisement. Neither party submitted an additional

brief on the issue as allowed at the hearing. Now, having considered the evidence, I enter the following order denying plaintiffs request for a preliminary and permanent injunction.

The facts relevant to plaintiffs' motion are as follows. Lease Purchase Corporation ("Lease Purchase") is the parent corporation of a network of 36 mobile home dealers ("the dealers") formerly in the business of selling new and used mobile homes. Defendant CIT purchased retail sale installment agreements ("installment agreements") executed by mobile home purchasers and individual dealers under the terms of a dealer underlying agreement ("dealer agreement") entered into by CIT and each dealer. Under the dealer agreements CIT is entitled to retain a portion of the proceeds from each installment agreement purchased from a dealer. Withheld proceeds are posted to various reserve accounts ("dealer reserve accounts") to cover any loss sustained if an installment contract is not paid in full and the dealer defaults on its obligations under the dealer agreement. Each dealer is entitled to receive amounts credited to its dealer reserve account in two situations. Twice each year a dealer is paid from the account those funds exceeding 5% of the aggregate outstanding balance of all installment contracts purchased from that dealer (assuming CIT has not discontinued purchasing installment contracts from the dealer and the dealer is not in default). Additionally, a dealer receives the balance of its reserved payment account after CIT finally

discontinues purchasing installment contracts from that dealer and after any installment contract losses sustained by CIT, with respect to installment contracts purchased from that dealer, have been satisfied with reserve monies.

On November 2, 1987 Lease Purchase and two of its subsidiary holding companies, Hutchinson Homes, Inc. and Velstar Enterprises, Inc. filed chapter 11 bankruptcy petitions in this court. The chapter 11 cases were subsequently converted to chapter 7 and James D. Walker, Jr. was appointed as trustee. All of the 36 dealers have subsequently filed chapter 7 petitions and have been joined as co-plaintiffs in this adversary proceeding. CIT filed a proof of claim in the chapter 11 cases alleging that total estimated future contract losses due to defaults on purchased retail contracts from all dealers as of the date of the first bankruptcy filing November 2, 1987, as \$5,737,500.00. The proof of claim indicates a balance in all dealer reserve accounts of \$2,007,067.00, leaving a balance alleged as owed to CIT of \$3,729,733.00. The chapter 7 trustee and co-plaintiffs brought this adversary proceeding seeking turnover of the dealer reserve accounts pursuant to 11 U.S.C. §§ 542 and 543 and an accounting by CIT of all funds held in the dealer reserve accounts and any prior chargebacks against the dealer reserve accounts. In this motion, plaintiffs allege that CIT has been offsetting its losses against the dealer reserve accounts during the pendency of the plaintiffs' bankruptcy cases and this

adversary proceeding in violation of the automatic stay of § 362 and seek turnover of these accounts into the registry of the court or the trustee.

Plaintiffs' interests in the dealer reserve accounts is not in a fund of money which can be sequestered by the court, but is a contract claim against CIT more properly characterized as a general intangible.¹ The reserve accounts are not monetary deposit or bank accounts held on behalf of each dealer; they are merely bookkeeping entries in CIT's accounting records. The accounts here are distinguishable from bank accounts, against which banks are stayed from offset. See In re Patterson, 967 F.2d 505 (11th Cir. 1992). Bank accounts represent a fund of money from which a debtor could withdraw all amounts at any time prior or subsequent to entering bankruptcy. Neither the dealers nor the trustee have an equivalent right to withdraw monies from these reserve accounts. Payment from such accounts are available to dealers or the trustee only in accordance with terms of the dealer agreements.

I have previously ruled in this adversary proceeding that CIT has a valid common law right of recoupment as a defense to the trustee's action for turnover of the dealer reserve accounts. In re Lease Purchase Corporation, Chapter 7 Case No. 87-11177, Adv. No.

¹A general intangible is defined as "any personal property (including things in action) other than goods, accounts, chattel paper, documents, instruments, and money." O.C.G.A. § 11-9-106.

90-1092, slip op. at 11-12 (Bankr. S.D. Ga. November 11, 1991) (hereinafter "Order"). A recoupment is not subject to the automatic stay of § 362. Holford v. Powers, 896 F.2d 176, 179 (5th Cir. 1990). While 11 U.S.C. § 362(a)(7) stays setoff of a claim, it does not operate to stay recoupment. In re Career Consultants, Inc., 84 B.R. 419, 426 (Bankr. E.D. Va. 1988). "[A] setoff is a counterclaim arising from an independent claim the defendant has against the plaintiff. Recoupment is the right of the defendant to have the plaintiff's monetary claim reduced by reason of some claim the defendant has arising out of the very contract giving rise to plaintiff's claim." First National Bank of Louisville v. Master Auto Service Corporation, 693 F.2d 308, 310 n.1 (4th Cir. 1982).

Although CIT's "recoupment" of its losses under the dealer agreements is not stayed, CIT's determination of the amount to be recouped is subject to court oversight. See Holford, 896 F.2d at 178. Because the trustee (of the various bankruptcy estates) takes his interest in the debtor's (dealer's) property subject to CIT's right of recoupment, the exact extent of the trustee's interest in each of the various dealer reserve accounts remains indeterminate until there has been a final accounting. The determination of exactly what portion of a dealer reserve account is property of that dealer's estate, if any, will be based on the losses already suffered by CIT on installment contracts purchased from a dealer, and any future losses expected to be suffered on installment

contracts from that dealer, discounted to present value. Order at 14. This determination will be made as to each dealer reserve account at trial of the adversary proceeding. Any funds withheld by CIT which exceed a dealer's liability on a reserve account as determined by this process will be property of that dealer's bankruptcy estate and will be subject to turnover to the trustee. In addition, as recoupment is a defense to the trustee's contract claim, CIT has the burden of proving the existence and extent of recoupment damages. Order at 11. To whatever extent CIT fails to carry this burden with regard to any particular dealer reserve account, the trustee will be entitled to those funds.

Although CIT is continuing to account for losses suffered during the dealer's bankruptcies by making entries in its accounting records, these procedures are not truly effecting a recoupment. No "recoupment" actually occurs until I make the final determination as to the rights of CIT and the trustee to the amounts listed in the various dealer reserve accounts. CIT is not violating the automatic stay by continuing such accounting, but is merely substantiating its defense against plaintiffs' claims to the reserve accounts. The only effect of granting of a temporary injunction of such accounting methods would be to prevent CIT from properly raising its defense to plaintiffs' claims at trial. In addition, as these dealer reserve accounts are not actual funds of money being held by CIT and because no actual monies in CIT's possession are being dissipated by CIT's

accounting procedures, a turnover or sequestration of dealer reserve monies is improper. If the trustee establishes a dealer's right to any of that dealer's reserve account at trial, then CIT will be required to turn over in money to the trustee the value of that account.

Accordingly, it is hereby ORDERED that plaintiffs' motion for preliminary and permanent injunction is denied; and further

ORDERED that plaintiff's request for payment of the dealer reserve account funds into the registry of the court or to the trustee is denied.

JOHN S. DALIS
UNITED STATES BANKRUPTCY JUDGE

Dated at Augusta, Georgia
this 29th day of September, 1993.