IN THE UNITED STATES BANKRUPTCY COURT

FOR THE

SOUTHERN DISTRICT OF GEORGIA
Augusta Division

IN RE:	)	Chapter 7 Case
	)	Number 93-10735
EDWIN GUNN	)	
MARTHA LANIER GUNN	)	
	)	
Debtors	)	FILED
	)	at 3 O'clock & 47 min. P.M.
	)	Date: 3-30-94
EDWIN GUNN	)	
	)	
Plaintiff	)	
	)	
vs.	)	Adversary Proceeding
	)	Number 93-01078A
YANCEY BROTHERS, INC.	)	
	)	
Defendant	)	

ORDER

Edwin Gunn, debtor in the underlying bankruptcy case, filed this adversary proceeding against defendant Yancey Brothers, Inc., alleging a violation of the automatic stay of 11 U.S.C. § 362 for failure to turn over a tractor retained pursuant to an order foreclosing a mechanic's lien. Defendant filed a counterclaim seeking relief from stay in order to sell the vehicle. The central issue to be resolved is whether debtor retained an interest in the vehicle at the time of the bankruptcy filing. The matter having come on for trial and having considered the evidence presented, I

enter the following order.

Debtor is engaged in the logging business and filed his chapter 13 petition on May 13, 1993. In February or March 1991, debtor engaged defendant to repair a 1974 International Tractor, Serial Number 43747DYB13484 ("the tractor"). Debtor had assumed the tractor was under warranty and was unable to pay for the cost of the repairs, $7097.70. Through its retention of possession, defendant asserted a mechanic's lien on the vehicle pursuant to Georgia law. The defendant instituted procedures in the Superior Court of McDuffie County to obtain an order foreclosing the lien. After debtor failed to respond to the action, on July 30, 1992 Superior Court Judge Robert L. Stevens entered an order submitted by defendant's counsel finding that the lien was valid, and ordering that defendant's lien "be foreclosed, and [defendant] be permitted to sell said personal property in accordance with Georgia law."

Defendant attempted to sell the tractor and offered debtor $100.00 for title. Subsequently, defendant discovered that Allied Bank of Thompson ("Allied") held a first lien on the tractor as evidenced on the certificate of title in the bank's possession. The proof of claim and accompanying documentation filed by Allied in debtor's bankruptcy, stipulated to by the parties, shows it holding a general judgment lien for $92,556.68 along with a security interest in various tractors, trailers, tools, shop equipment,

vehicles and household items. No notice had been given to Allied of the action by defendant to foreclose its mechanic's lien on the vehicle. Defendant entered into an agreement with Allied permitting defendant to sell the tractor with the proceeds to go first to pay off defendant's lien and the balance to reduce the debt owed Allied. However, as of the date of debtor's petition filing, defendant was still in possession of the tractor not having disposed of it by sale nor having attempted to perfect its lien by having it listed on the certificate of title. Subsequent to debtor's filing, counsel for debtor requested turnover of the tractor. Defendant refused, pursuant to advice of counsel that it was entitled to retain the tractor. Debtor then initiated the instant adversary proceeding alleging that defendant's actions constitute a violation of the automatic stay. Defendant filed a counterclaim alleging that debtor retained only a interest in any proceeds of the sale to the extent of any equity in the vehicle and seeking relief from the automatic stay to allow for a sale of the tractor. The tractor is presently inoperable, but debtor testified that he could repair it if returned.

Debtor is currently operating his logging business with one tractor and return of the tractor would increase his gross revenue by $2,000.00 per week. Operating costs for the tractor per week are $500.00 for a driver and $300.00 fuel. Insurance on the

tractor costs approximately $2,200.00 per year or $42.30 per week. Based on these figures, debtor could increase his net revenue by approximately $1,150.00 per week if the tractor was returned and subsequently repaired.

The issue in this adversary proceeding is the effect of the pre-bankruptcy Superior Court order foreclosing defendant's lien on the nature of debtor's interest in the tractor as of the bankruptcy filing. Defendant contends that under Georgia law, the order foreclosing its lien conclusively cut off any interest of debtor in the vehicle. Debtor contends that until a sale of the vehicle occurs, he retains a right to redeem the vehicle. In this case, defendant foreclosed its lien under Official Code of Georgia Annotated ("O.C.G.A.") §§ 44-14-363; 44-14-550 governing foreclosure of liens on personalty.[1] Although O.C.G.A. § 40-3-54 governs the

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[1]O.C.G.A. § 44-14-363 provides in pertinent part:

> (a) All mechanics of every sort shall have a special lien on personal property for work done and material furnished in manufacturing or repairing the personal property and for storage of the personal property after its manufacture or repair . . . . Such special liens may be asserted by the retention of the personal property or the mechanic may surrender the personal property and give credit when the lien is enforced in accordance with Code Section 44-14-550; and if such special liens are asserted by retention of the personal property, the mechanic shall not be required to surrender the property to the holder of a subordinate security interest or lien. Such liens shall be superior to all liens except liens for taxes and such other liens as the mechanic may have had actual notice of before the work was done or material furnished.

O.C.G.A. § 44-14-550 provides:

Liens on personal property, other than mortgages, when not otherwise provided for, shall be foreclosed in accordance with the following provisions:

> (1) There shall be a demand on the owner, agent, or lessee of the property for payment and a refusal to pay; and such demand and refusal shall be averred. If, however, no such demand can be made on account of the absence from the county of his residence of the party creating the lien on personal property, by reason of his moving or absconding from the county of his residence, or other acts which show an intention to be absent from the county so as to defeat the demand, the party holding the lien shall not be obligated to make a demand but may foreclose without such demand; provided, however, that if possession is retained or the lien recorded, the owner-debtor may contest the validity of the amount claimed to be due by making written demand upon the lienholder. If upon receipt of the demand the lienholder fails to institute foreclosure proceedings within ten days, where possession has been retained, or within 30 days, where possession has been surrendered, the lien is forfeited.
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> (2) A person asserting the lien, either for himself or as a guardian, administrator, executor, or trustee, may move to foreclose the lien by making an affidavit to a court of competent jurisdiction showing all the facts necessary to constitute a lien and the amount claimed to be due. The plaintiff shall verify the statement by oath or affirmation and shall affix his signature thereto;
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> (3) Upon the affidavit being filed, the clerk or a judge of the court shall serve notice upon the owner, the recorded lienholders and the lessee of the property of a right to a hearing to determine if reasonable cause exists to believe that a valid debt exists. The hearing must be petitioned for within five days after receipt of the notice; and, if no petition for the hearing is filed within the time allowed, the lien will conclusively be deemed a valid one and foreclosure thereof allowed;
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> (4) If a petition for a hearing is filed within the time

procedure for foreclosing a mechanic's lien on a motor vehicle, that statute is only effective as to motor vehicles for which a certificate of title is required. See O.C.G.A. § 40-3-54(a).

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allowed, the court shall set the hearing within ten days of the filing of the petition. If at the probable cause hearing the court determines that reasonable cause exists to believe that a valid debt exists, the person asserting the lien shall be given possession of the property or the court shall obtain possession of the property as ordered by the court. The defendant may retain possession of the property by giving bond and security for the amount determined to be due and for costs of the action;

(5) Within five days of the probable cause hearing, the defendant must petition the court for a full hearing on the validity of the debt if a further determination of the validity of the debt is desired. If no such petition is filed, the lien on the amount determined reasonably due shall be conclusively deemed a valid one and foreclosure thereof allowed. If such a petition is filed, the court shall set a full hearing thereon within 30 days of the filing of the petition. Upon the filing of the petition by the defendant, neither the prosecuting lienholder nor the court may sell the vehicle, although possession of the vehicle may be retained;

(5) If after a full hearing, the court finds that a valid debt exists, then the court shall authorize the foreclosure upon and sale of the property subject to the lien to satisfy the debt if the debt is not otherwise immediately paid;

(6) If the court finds the actions of the person asserting the lien in retaining or seeking possession of the property were not taken in good faith, the court in its discretion may award damages to the owner, agent or lessee due to the deprivation of the use of the property; and

(7) Any proceeding to foreclose a lien on personal property must be instituted within one year from the time the lien is recorded or is asserted by retention.

Apparently, foreclosure of the lien was not had under the motor vehicle statute as debtor's 1974 tractor was not required to have a certificate of title at the time of foreclosure of the lien, being more than 15 model years old and less than ten thousand pounds gross vehicle weight. See O.C.G.A. §§ 40-3-20(a); 40-3-4(14). Both O.C.G.A. § 40-3-54 and O.C.G.A. § 44-14-550 are essentially the same in terms of procedure for foreclosing liens, however, and contain almost identical language. The major difference between the two regards the priority given the mechanics lien. See O.C.G.A. § 44-14-363 (liens foreclosed pursuant to § 44-14-550 given priority over all liens except for taxes and other liens of which the mechanic had actual notice before the work was done or material furnished); O.C.G.A. § 40-3-54 (over all liens except for taxes and other liens and security interests of which the mechanic had actual or constructive notice).[2] Accordingly, case law under either section is applicable on this issue.

Although neither O.C.G.A. § 44-14-550, § 40-3-54 or case law explicitly state that a debtor has a right to redeem a motor vehicle after a foreclosure judgment is entered but prior to sale, I find that such a right exists. Subsection (6) of O.C.G.A. § 44-14-550 provides that if "the court finds that a valid debt exists, the court shall authorize the foreclosure upon and sale of the

[2]This decision does not address the priority of asserted liens.

property subject to the lien to satisfy the debt if the debt is not otherwise immediately paid[.]" Implicit in this language is a recognition that even after a foreclosure judgment, an owner-debtor is entitled to redeem his property and prevent sale of the property and satisfaction of the lien by payment of the debt found to exist at hearing. Likewise, these statutes' lien foreclosure procedures are designed to perform a twofold function: (1) to determine the validity of the debt and (2) to authorize a prompt enforcement of valid liens by immediate sale of the property to satisfy the debt. See Carpet Transport, Inc. v. Fisher, 166 Ga. App. 450, 304 S.E.2d 540 (1983) (construing the operation of O.C.G.A. § 40-3-54). The import of this operation is that a foreclosure judgment simply fixes the mechanic's interest in the vehicle or property (by determining the debt's validity) and that the ownership rights of the debtor (including the right of redemption) are not affected until the judgment is enforced by sale. This reading is consistent with other Georgia Code provisions. Section 40-3-34 governs transfers of a motor vehicle by operation of law (involuntary transfers) and provides in pertinent part that "[i]f the interest of the owner is terminated, whether the vehicle is sold pursuant to a power contained in a security agreement or by legal process at the instance of the holder of a security interest or a lien . . . ." O.C.G.A. § 40-3-34(b) (emphasis added). Similarly, O.C.G.A. § 9-13-

173 provides that "[a] sale regularly made by virtue of judicial process issuing from a court of competent jurisdiction shall convey title as effectually as if the sale were made by the person against whom the process was issued." Both sections implicitly conclude that foreclosure is not complete, title is not passed and an owner retains rights in the property until an actual sale of the property.

In addition, when the rights of the holder of a priority security interest in the property are considered, it is clear that the owner's interest in the property is not cut off until the foreclosure sale. Under O.C.G.A. § 40-3-54, an entry of an order foreclosing a lien does not require the lienor to pay the debt due the senior security holder as part of the foreclosure. Instead, the purchaser at the foreclosure sale takes the property subject to such prior liens and security interests recorded on the certificate of title. Fisher, 166 Ga. App. at 451, 304 S.E.2d at 541-42 (citing O.C.G.A. § 40-3-54(a)). Moreover, under Georgia's Commercial Code statutes a debtor/owner has a right to redeem his property from a secured party at any time before the secured party has disposed of the collateral, entered into a contract for its disposition, or has retained the collateral in full satisfaction of the debt. O.C.G.A. § 11-9-506. Although this provision does not apply to lienors, when a mechanic's lien has been foreclosed but a sale had not been made and a senior security interest exists, it would be inconsistent to

find that a debtor's rights in the property are cut off by an order of foreclosure authorizing sale, but that debtor would still retain a right to redeem property from a secured creditor if that debt were in default.

Based upon the foregoing, I find that debtor's ownership rights in the tractor were not cut off by the order of foreclosure and that debtor retained his ownership interest in and a right to redeem the tractor from the mechanic's lien on the date of the bankruptcy filing. Debtor's right to redeem the vehicle pursuant to applicable state law represents a legal and equitable interest of the debtor in property and such property interest is property of the estate under 11 U.S.C. § 541. In re Saylors, 869 F.2d 1434 (11th Cir. 1989); In re Holden, Chap. 13 case No. 90-11275, slip op. at 3 (Bankr. S.D. Ga. January 11, 1991).

Upon filing for relief under Chapter 13, the automatic stay operates to preclude the commencement or continuation of any action against the debtor, any act to exercise control over property of the estate, or any act to enforce against property of the debtor any lien to the extent that such lien secures a claim that arose before the commencement of the case. 11 U.S.C. § 362(a)(1), (3), (5). The action of defendant in refusing to turnover property of the estate to debtor upon notice of the chapter 13 filing, without first obtaining relief from the automatic stay of § 362, is a

prohibited act of a creditor exercising control over property of the estate. 11 U.S.C. § 362(a)(3).

> The duty to turnover the property is not contingent upon any predicate violation of the stay, any order of the court, or any demand of the creditor [cite omitted] . . . Rather, the duty arises upon the filing of the bankruptcy petition. The failure to fulfill this duty . . . constitutes a prohibited attempt to 'exercise control over property of the estate' in violation of the automatic stay.

In re Knaus, 889 F.2d 773, 775 (8th Cir. 1989). It is incumbent upon the creditor to act. If the creditor believes it is entitled to retain possession of the property a prompt filing of a motion for relief from stay is required. See 11 U.S.C. §362(f); In re Patterson, 967 F.2d 505, 511 (11th Cir. 1992); In re Blackmon, Chapter 13 case No. 91-10089, Adv. No. 91-1009 (Bankr. S.D. Ga. March 22, 1991). The defendant ignored the notice of the bankruptcy filing and the demand and did nothing until by counterclaim in this adversary proceeding it sought relief from the stay of §362(a) to sell the tractor.

Bankruptcy Code § 362(h) provides for the recovery of actual damages including costs and attorney fees and in appropriate circumstances, the recovery of punitive damages by an individual injured by a willful violation of the § 362(a) stay. "Willful", as used in § 362(h) means simply acting intentionally or deliberately knowing of the bankruptcy petition. In re Aponte, 82 B.R. 738, 742

(Bankr. E.D. Pa. 1988). In this case, the defendant, with full knowledge of the bankruptcy petition, retained possession of and refused to turnover the vehicle to debtor. This act was willful under § 362(h).

Debtor claims damages for the loss of use of the tractor in his business of $250.00 per day from the date of demand May 13, 1993 until return. The evidence presented at trial establishes that, if the tractor is working, the debtor can generate net income of $230.00 per day. The debtor seeks turnover of the tractor in order to repair it and to return it to his business. No evidence was introduced by the debtor establishing the expense necessary to return the tractor to the debtor's business nor has the debtor demonstrated the financial ability to repair the vehicle on May 13, 1993, the date of demand. Debtor has failed to establish by a preponderance of the evidence damages to establish a loss of income. Section 362(h) however, provides that an injured individual "shall recover actual damages, including costs and attorneys' fees," for any willful violation of the stay. The debtor has incurred attorney fees in the amount of $1,165.00 in prosecuting this adversary proceeding. From the evidence presented monetary damages are limited to the attorney fees incurred by the debtor in seeking recovery of the tractor.

Defendant's counterclaim seeks a grant of relief from the

automatic stay pursuant to 11 U.S.C. § 362(d) so that it can sell the tractor. Defendant's counterclaim appears to allege a "for cause" basis for relief under § 362(d)(1), based solely on its contention that debtor retained only an equity interest in the vehicle at time of filing. Under 11 U.S.C. § 362(g) the party opposing the relief from stay bears the burden of proof on all issues other than debtor's equity in the property. Based on my determination that debtor had a right of redemption as of the date of filing, I find that debtor has carried its burden of proving that no cause exists for a grant of relief from stay on the basis asserted by defendant.

It is therefore ORDERED that judgment is entered for the plaintiff Edwin Gunn against defendant Yancey Brothers, Inc. in the sum of $1,165.00 together with future interest as provided by law; and

further ORDERED that the defendant is ORDERED to turn over the tractor to the appropriate representative of the bankruptcy estate[3]; and

further ORDERED that the defendant's motion for relief from stay is denied and judgment on defendant's counterclaim is entered for the plaintiff.

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[3]Subsequent to trial the debtor converted the underlying case from a case under Chapter 13 to a case under Chapter 7. The appropriate estate representative is the Chapter 7 case trustee.

JOHN S. DALIS
UNITED STATES BANKRUPTCY JUDGE

Dated at Augusta, Georgia

this 30th day of March, 1994.