

510 Subordination

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE
SOUTHERN DISTRICT OF GEORGIA
Savannah Division

In the matter of:)
)
C. POE BLACKWELDER)
(Chapter 13 Case 488-01093))
)
Debtor)
)
)
FIRST UNION NATIONAL BANK)
OF GEORGIA)
)
Plaintiff)
)
v.)
)
UNITED STATES OF AMERICA)
d/b/a Small Business)
Administration)
)
Defendant)

Adversary Proceeding
Number 488-0089

FILED
at 11 O'clock & 25 min A M
Date 5/8/89
MARY C. BECTON, CLERK
United States Bankruptcy Court
Savannah, Georgia *PCB*

MEMORANDUM AND ORDER

First Union National Bank of Georgia filed a complaint to determine secured status against the Small Business Administration which was scheduled for trial on January 18, 1989. At that time the parties indicated that they believed the case could be submitted to the Court on an agreed stipulation of facts and the Court continued the matter for the parties to file such a

stipulation. The Court has now received briefs from both parties, the latest having been filed on March 9, 1989. Although there is no single stipulation entered by the parties and filed with this Court, there does not appear to be any material issue of fact raised in the briefs filed by the parties and therefore I make the following Findings of Fact and Conclusions of Law.

FINDINGS OF FACT

1) In February, 1979, Savannah Bank and Trust Company, a corporate predecessor to First Union National Bank of Georgia ("First Union"), extended credit to C. Poe Blackwelder, Debtor in the case underlying this adversary proceeding. The loan was secured by deed to secure debt on his residential property and a first preferred ship's mortgage on a shrimpboat known as the "Miss Carol J". The debt deed on Debtor's residence was junior in priority to a first mortgage held by Tharpe and Brooks Mortgage Company and to one or more deeds to secure debt held by the Small Business Administration.

2) In a letter dated February 20, 1978 the Small Business Administration ("SBA") stated its understanding that a different shrimpboat, the "Celia M", which was held by SBA as additional collateral for its loans, was to be sold by the

Debtor "and that the proceeds of sale will be applied to the outstanding balances of those loans." The letter further committed the Small Business Administration to subordinate its lien position on the residence to the Bank "should the proceeds of that sale be insufficient to pay those loans in full." (Exhibit "A" to Complaint).

3) On June 29, 1979, the SBA notified Mr. Robert Salligot that it had approved the Debtor's request to release its lien on the "Celia M", so as to allow the vessel to be sold for \$20,000.00. The SBA agreed that the \$20,000.00 proceeds could be used to pay outfitting costs on a third shrimpboat contingent upon the borrower paying \$4,400.00 to the SBA to bring the three notes current which were secured by the SBA's lien which was superior in rank to the Bank's.

4) The "Celia M" was sold and the \$20,000.00 disbursements were made by the Debtor in accordance with the June 29, 1979 letter.

5) There is no evidence that Savannah Bank and Trust Company was made aware of the contents of the June 29, 1979 letter.

6) The effect of the Small Business

Administration's agreement to allow the Debtor to disburse the proceeds in that manner was that the indebtedness secured by a lien superior to that of Savannah Bank and Trust Company was not reduced to the full extent of the proceeds of the sale of this additional collateral. First Union National Bank as successor to Savannah Bank and Trust asks this Court for an interpretation of the language of the February 20, 1978 letter and a determination that it is an enforceable agreement to subordinate which was consummated by the subsequent sale of the "Celia M".

CONCLUSIONS OF LAW

11 U.S.C. Section 510(a) provides that a subordination agreement which is enforceable under applicable non-bankruptcy law is enforceable to the same extent in bankruptcy. The letter dated February 20, 1978 followed by the Bank's action in extending credit to the Debtor and the subsequent application of a portion of the proceeds to the SBA debt, taken together, constitute evidence of a valid enforceable contract by the SBA to subordinate its position. O.C.G.A. 13-3-17; Cameron v. Churchill Mortgage Corp., 249 Ga. 362, 363 (1982); North Georgia Savings and Loan Assoc. v. Corbeil, 177 Ga.App. 523, 524 (1986). While there is arguably an ambiguity in the February 20th letter as to what would happen if the entire

proceeds of the sale of the "Celia M" were not applied to the superior liens, I am persuaded that the intent of the agreement was simply to insure that the Debtor could not, without SBA's approval, use the proceeds for any other purpose. However, since the SBA consented to permit Debtor to use \$15,600.00 of the money to outfit another vessel, the "Sherril Ann", and since the SBA took a second lien position on that vessel it is clear to me that the SBA waived its right to insist on application of all of the proceeds to the loan and in effect substituted other collateral, the shrimpboat, for its second lien position in the real estate. There is no evidence to support a finding that the Bank acquiesced or participated in any way in this decision by the SBA or indeed benefited from it. Rather, the SBA would benefit in an inequitable way were it permitted to take a portion of the proceeds and apply it to the superior loan, refuse to subordinate the superior loan and at the same time take a collateral position in other collateral which presumably it must have considered to be as valuable as a second lien position in the Debtor's real estate. This is particularly true when the net effect would be that the Savannah Bank and Trust Company, without its consent, was deprived of the right to insist on an additional \$14,600.00 reduction in the second mortgage which was of record ahead of its junior mortgage. For that reason I conclude that the Bank should prevail in the complaint which it has brought.

O R D E R

Pursuant to the foregoing Findings of Fact and Conclusions of Law IT IS THE ORDER OF THIS COURT that the secured status of the Small Business Administration as it relates to Debtor's residential real estate be, and the same is, hereby declared to be subordinated to that of First Union National Bank of Georgia.



Lamar W. Davis, Jr.
United States Bankruptcy Judge

Dated at Savannah, Georgia

This 5th day of May, 1989.