

"Property of the estate" does not include expired leasehold interest in non-residential real property.

IN THE UNITED STATES BANKRUPTCY COURT

FOR THE

SOUTHERN DISTRICT OF GEORGIA
Savannah Division

In the matter of:)

BURROUGHS BROTHERS MOTOR)
COMPANY, INC.)

Debtor)

JIMMIE HALE)

Movant)

v.)

BURROUGHS BROTHERS MOTOR)
COMPANY, INC.,)

and)

JACK K. BERRY,)
UNITED STATES TRUSTEE)

Respondents)

Chapter 11 Case

Number 89-41062

FILED

at 11 O'clock & 52 min. AM

Date 11/27/89

MARY C. BECTON, CLERK
United States Bankruptcy Court
Savannah, Georgia *PCB*

MEMORANDUM AND ORDER
ON MOTION FOR RELIEF FROM STAY

On October 5, 1989, a hearing was held on the Motion of Jimmie Hale for relief from stay. After consideration of the evidence adduced at trial, and the briefs submitted by the parties,

I make the following Findings of Fact and Conclusions of Law.

FINDINGS OF FACT

1) On or about May 14, 1985, the Debtor, Burroughs Brothers Motor Company, Inc., ("Burroughs") executed a deed to secure debt in favor of ITT Financial Services/Commercial, Inc., ("ITT"). Said deed to secure debt was duly recorded in the Office of the Clerk of the Superior Court of Chatham County, Georgia, in Deed Book 126-V, pages 636-38, and constituted a valid second mortgage on the tract of property at issue in the present case. The mortgage was conveyed to secure the payment of a promissory note in the principal amount of \$47,000.00.

2) Debtors fell into default on payments on said note and ITT, pursuant to the terms of the deed and the note, declared the entire principal and interest immediately due and payable and upon the Debtor's failure to cure the default, ITT began advertising the Burroughs tract for foreclosure purposes in the Savannah News Press, published in Chatham County, Georgia, said dates of publication being September 10, September 17, September 24, and October 1, 1987.

Debtor, by and through its president and controlling shareholder, Richard Burroughs, approached the Movant Hale in an attempt to borrow sufficient funds to redeem the property at the foreclosure sale. The Debtor contends that Hale agreed to lend the funds and that he accompanied Richard Burroughs to the Chatham County Courthouse on the date of sale, but that once there, unknown to the Debtor, Hale purchased the property outright from ITT. Hale, on the other hand, contends that after negotiation with Burroughs he orally agreed to purchase the property at the foreclosure sale and then lease the property back to the Debtor for a period of one year. During the lease period Hale contends that Debtor was to make monthly lease payments to him in the amount of \$825.00. At the end term, and if Debtor was then not delinquent in his lease obligations, Debtor would have the option to repurchase the Burroughs tract for \$75,000.00.

3) In June, 1988, Hale filed a dispossessory warrant in the Magistrate's Court of Chatham County alleging that the Debtor was in arrears \$3,000.00 in monthly lease obligations. Thereafter Debtor's counsel removed the case to Superior Court of Chatham County. In subsequent proceedings, Hale testified that the Debtor was actually in arrears more than \$3,000.00, but that the Magistrate's Court jurisdictional limit prohibited him from claiming the actual amount due of more than \$11,000.00, including lease

payments and other amounts advanced to Debtor by Hale.

4) In its temporary order dated November 15, 1988, the Superior Court of Chatham County made a findings of fact that, by way of documentary evidence, Hale had established prima facie evidence that he should temporarily be entitled to ownership and possession of the property. All other issues, including a determination of title to the premises in issue were reserved. Said order was affirmed without opinion by the Supreme Court of Georgia on May 4, 1989.

5) Finally, on July 13, 1989, the Superior Court entered an order giving the Debtor until July 25, 1989, to vacate the Burroughs tract pursuant to its previous temporary order.

6) Debtor filed its Chapter 11 petition on July 24, 1989.

CONCLUSIONS OF LAW

Debtor asserts that the property at issue is property of the estate and hence should come under the protective umbrella of the automatic stay provisions of 11 U.S.C. Section 362(a). Hale,

on the other hand, argues that the Debtor has no equity in the property, no right to possession of the property, and hence is a mere trespasser and is not entitled to the stay protections of Section 362(a). I agree.

One of the fundamental protections provided to debtors under the Bankruptcy Code is the automatic stay of 11 U.S.C. Section 362. "It gives the debtor a breathing spell from his creditors. It stops all collection efforts, all harassment, and all foreclosure actions." H.R. Rep. No. 95-595, 95th Cong., 1st Sess. 174 (1977), reprinted in 1978 U.S. Code Cong. & Admin. News, 5787, 6296. The automatic stay provision functions to facilitate the orderly administration of the debtor's estate. Donovan v. TMC Industries, Ltd., 20 B.R. 997 (N.D.Ga. 1982). The stay operates to bring the property of the debtor into the custody of the "bankruptcy court by the filing of a petition, and no interference with that custody can be countenanced without the court's permission". In re Adana Mortgage Bankers, Inc., 12 B.R. 989 (Bankr. N.D.Ga. 1980), vacated by joint motion, 687 F.2d 344 (11th Cir. 1982). Without such a provision the orderly liquidation or rehabilitation of the debtor would be impossible. H.R. Rep. No. 95-595 at 174; S. Rep. No. 95-989, 95th Cong., 2d Sess. 49 (1978). In relevant part, Section 362 provides:

(a) Except as provided in subsection (b) of this section, a petition filed under section 301, 302, or 303 of this title . . . operates as a stay, applicable to all entities, of--

(3) any act to obtain possession of property of the estate or of property from the estate or to exercise control over property of the estate;

(6) any act to collect, assess, or recover a claim against the debtor that arose before the commencement of the case under this title;

As noted above, the stay applies to any act to obtain property of the estate or property from the estate. Thus the inquiry must focus on whether the Burroughs tract is property of the estate.

Hale contends that the property at issue is not "property of the estate" within the meaning of Section 541 of the Bankruptcy Code, and that the property in question is also not property "from the estate" within the meaning of Section 362(a)(3), and thus he is entitled to relief from the automatic stay provisions of Section 362. 11 U.S.C. Section 541 defines "property of the estate" and actions which may be taken with respect thereto. Subsection (a)(1) gives a very broad definition to "property of the estate" as: "All legal or equitable interest of the debtor in

property as of the commencement of the case." In enacting Section 541, Congress intended that the definition be quite broad as indicated by the legislative history:

The scope of this paragraph is broad. It includes all kinds of property, including tangible or intangible property, causes of action . . . and all other forms of property currently specified in section 70(a) of the Bankruptcy Act The debtor's interest in property also includes 'title' to property which an interest just as are a possessory interest, or a leasehold interest, for example.

H.R. Rep. No. 95-595, 95th Cong., 1st Sess. 367 (1977); S. Sep. No. 95-989, 95th Cong., 2d Sess. 82 (1978); Reprinted in 1978, U.S. Code Cong. & Admin. News, 6323.

It is apparent from the legislative history of 11 U.S.C. Section 541 that the property of the estate can encompass a leasehold interest of the debtor in property. However, Section 541(b)(2) specifically provides that property of the estate does not include an expired leasehold interest. Collier on Bankruptcy explains this provision as follows:

Section 541(b)(2), added to the Code in 1984, expressly provides that a lease of non-residential real property under which the debtor is the lessee does not become property of the estate if the term of lease

expires before the case is commenced. If the term of the lease expires during the case, section 541(b)(2) provides that the leasehold interest ceases to be included in the property of the estate as of the lease's expiration.

4 Collier on Bankruptcy, §541.21A at 541-110 (15th Ed. 1989). It is clear in the present action that any leasehold interest that the debtor may have had terminated after the unfavorable ruling on this issue by the Supreme Court of Georgia prior to the commencement of this Chapter 11 case.

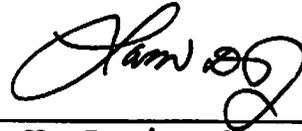
Debtor argues that it somehow has equity in the property simply due to the fact that it has expended corporate funds in order to initially acquire the property. However, this completely ignores the effect of the foreclosure sale in which it lost all interest in title to the property. "To the extent that an interest is limited in the hands of the debtor, it is, therefore, equally limited in the hands of the estate." 4 Collier on Bankruptcy, §541.01 at 541-6 (15th Ed. 1989) [(citing 124 Cong. Rec. H11,096 (daily ed. Sept. 28, 1978))].

As shown above, the Debtor has demonstrated no present legal or equitable interest in the Burroughs tract to this Court.¹ 11 U.S.C. Section 541(a) defines property of the estate as "all legal or equitable interest of the debtor in property as of the commencement of the case". 11 U.S.C. Section 362 operates as a stay, applicable to all entities, of "any act to obtain possession of property of the estate or of property from the estate or to exercise control over property of the estate". As I find the debtor had not established, as of the date of filing, through litigation in Superior Court, any legal or equitable interest in the property at issue, I find that the property is not property of the estate, and the automatic stay provisions of 11 U.S.C. Section 362 are inapplicable in the present case.

¹ Nothing in this opinion shall be construed as binding res judicata upon any pending or future state court litigation between these parties. Rather, I am strictly limiting my analysis to the bankruptcy issue of possession as of the commencement of the present Chapter 11 bankruptcy case and its effect on the present Section 362 stay litigation. Should that litigation result in a rescission of the foreclosure or any determination that title or right to possession of the property is revested in Debtor, then Debtor's rights in the property will become property of the estate to be administered in this Court.

O R D E R

Pursuant to the foregoing Findings of Fact and Conclusions of Law, IT IS THE ORDER OF THIS COURT that Movant Hale is entitled to relief from the automatic stay provisions of 11 U.S.C. Section 362.



Lamar W. Davis, Jr.
United States Bankruptcy Judge

Dated at Savannah, Georgia

This 22nd day of November, 1989.