



SO ORDERED,

A handwritten signature in blue ink that reads "Neil P. Olack".

**Judge Neil P. Olack
United States Bankruptcy Judge
Date Signed: June 15, 2017**

The Order of the Court is set forth below. The docket reflects the date entered.

**UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF MISSISSIPPI**

IN RE:

RAY C. VIRGIL,

CASE NO. 17-01351-NPO

DEBTOR

CHAPTER 13

RAY C. VIRGIL

PLAINTIFF

VS.

ADV. PROC. NO. 17-00028-NPO

LONE STAR ENGINE

DEFENDANT

ORDER DENYING MOTION TO TURN OVER PROPERTY

This matter came before the Court for hearing on June 5, 2017 (the “June Hearing”), on the Motion to Turn Over Property, and For Expedited Hearing on Motion to Turnover Property (the “Turnover Motion”) (Adv. Dkt. 1)¹ filed by Ray C. Virgil, the plaintiff in the Adversary and the debtor in the Bankruptcy Case (the “Debtor”), and the Lone Star Engine Installation Center,

¹ The docket in the above-styled adversary proceeding (the “Adversary”) will be cited as “(Adv. Dkt. ____).” The docket in the related bankruptcy case, Case No. 17-01351-NPO (the “Bankruptcy Case”), will be cited as “(Bankr. Dkt. ____).” The expedited hearing portion of the Turnover Motion was not pursued, but the Court held the June Hearing within two (2) weeks of the filing of the Turnover Motion.

Inc.'s Response to Debtor's Motion to Turn Over Property and for Expedited Hearing on Motion to Turnover (the "Response") (Adv. Dkt. 9) filed by Lone Star Engine Installation Center, Inc. ("Lone Star") in the Adversary. At the June Hearing, David Fletcher ("Fletcher") represented the Debtor, Louise Harrell ("Harrell") represented Lone Star, and Letitia S. Johnson appeared on behalf of James L. Henley, Jr., the standing chapter 13 panel trustee. After fully considering the matter and being fully advised in the premises, the Court denied the Turnover Motion from the bench. This Order memorializes, supplements, and amends the Court's bench ruling.

Jurisdiction

The Court has jurisdiction over the parties to and the subject matter of the Adversary pursuant to 28 U.S.C. § 1334. This is a core proceeding pursuant to 28 U.S.C. § 157(b)(2)(E). Notice was proper under the circumstances.

Facts

1. The Debtor filed a voluntary petition for relief pursuant to chapter 13 of the Bankruptcy Code on April 7, 2017 (Bankr. Dkt. 1). The same day, the Debtor filed an amended voluntary petition for relief pursuant to chapter 13 of the Bankruptcy Code (the "Petition") (Bankr. Dkt. 5).

2. The Debtor filed the Debtor's Motion to Extend Automatic Stay and Expedited Hearing (the "Motion to Extend") (Bankr. Dkt. 26) in the Bankruptcy Case on May 23, 2017. The Debtor argued that he had previously filed another bankruptcy case² within one (1) year of filing the Petition. The Debtor attached to the Motion to Extend the Declaration in Support of Motion

² The Debtor's prior bankruptcy case, Case No. 17-00186-NPO (the "Prior Bankruptcy Case"), was filed on January 19, 2017, and the Court entered the Order (17-00186-NPO, Dkt. 36) dismissing the Prior Bankruptcy Case on March 31, 2017.

to Extend the Automatic Stay Pursuant to 11 U.S.C. § 362[(c)](3) (Mot. to Extend at 3-4), stating that the Prior Bankruptcy Case was not dismissed for failure to perform certain actions and that the Petition was filed in good faith. (Declaration at 1).

3. Lone Star filed the Objection to Extend the Automatic Stay (the “*Pro Se* Objection”) (Bankr. Dkt. 52), which was signed by Rafael Sanchez (“Sanchez”), the authorized agent for Lone Star. In the *Pro Se* Objection, Lone Star contended that “the vehicle is not owned by the debtor.” (Obj. at 1). Lone Star described the vehicle in question as a 2015 Chevrolet Silverado (the “Silverado”).³ In the *Pro Se* Objection, Lone Star claimed that the Silverado was actually owned by Larry Virgil (“Larry Virgil”), and was titled in his name in the State of Texas. (*Id.*).

4. The Court entered the Order to Show Cause (the “Show Cause Order”) (Bankr. Dkt. 53) requiring Lone Star to appear and show cause why the *Pro Se* Objection should not be stricken for failure to be signed by an attorney of record. The Court held a hearing on the Motion to Extend, the *Pro Se* Objection, and the Show Cause Order on May 22, 2017 (the “May Hearing”).

5. At the May Hearing, Harrell, who appeared on behalf of Lone Star, argued that because the Debtor did not own the Silverado, the automatic stay does not apply to Lone Star. Accordingly, she contended that the Motion to Extend should be denied as to Lone Star.

6. On May 31, 2017, the Court entered the Order: (1) Resolving Order to Show Cause;

³ According to the Debtor’s amended Schedule A/B: Property (Bankr. Dkt. 30 at 3-8), the Silverado has a value of \$43,046.04. The Debtor indicated on his schedules that Ally Financial (“Ally”) holds a secured interest in the Silverado. (Bankr. Dkt. 22 at 12). On April 27, 2017, Ally Capital filed a proof of claim (the “Ally POC”) (Bankr. Cl. No. 5-1) claiming that it had a secured interest in the Silverado. Attached to the Ally POC was the Certificate of Title (the “Mississippi Title”) (Ally POC at 11) showing that the Silverado is titled in Mississippi to the Debtor, with Ally holding a first lien.

(2) Striking Objection to Extend Automatic Stay; and (3) Granting Motion to Extend Automatic Stay (the “Order Extending Stay”) (Bankr. Dkt. 63). In the Order Extending Stay, the Court struck the *Pro Se* Objection for failure to be signed by an attorney.⁴ (Order Extending Stay at 6) (citing *Sw. Express, Co. v. Interstate Commerce Comm’n*, 370 F.2d 53, 55-56 (5th Cir. 1982)). Because there was no valid objection to the Motion to Extend, the Court granted the Motion to Extend. (*Id.* at 8).

7. Before the Court entered the Order Extending Stay, the Debtor filed the Turnover Motion. In the Turnover Motion, the Debtor stated that he “requested that Lone Star Engine [] turnover the [Silverado]. However, defendant refused to turn over said vehicle to debtor as required by 11 U.S.C. § 542.”⁵ (Turnover Mot. at 1). According to the Debtor, the Silverado is necessary for him to earn income to fund his Chapter 13 plan. (*Id.*).

8. In the Response, Lone Star contended that the Silverado is not owned by the Debtor. (Resp. at 1). According to Lone Star, the Silverado is owned by Larry Virgil, which is evidenced by the fact that it “is titled and registered in the State of Texas and, according to the Texas title, the legal owner is Larry Virgil” (*Id.*). The Response provides that Lone Star was never paid for “mechanic’s services and engine repair” services that it performed on the Silverado, “and, in accordance with applicable Texas law, perfected a worker’s or mechanic’s lien on the vehicle prior to the date of Debtor’s current chapter 13 bankruptcy filing.” (*Id.*). Citing Texas law, Lone Star argued that if it turns the truck over to the Debtor, “its possessory lien is lost, with no provision

⁴ At the May Hearing, Harrell attempted to enter into evidence an amended objection to the Motion to Extend. The Court disallowed the amended objection as untimely and found that the Local Rules required Harrell to file the amended objection electronically, which she failed to do. (Order Extending Stay at 6-7) (citing MISS. BANKR. L.R. 5005-1(a)(2)(A)).

⁵ Hereinafter, all code sections refer to the Bankruptcy Code found at title 11 of the United States Code unless indicated otherwise.

for restoration.” (*Id.* at 2).

9. At the June Hearing, the Debtor testified that he purchased the Silverado in November of 2014, and received title to it that same day. Subsequently, his brother, Larry Virgil, drove the Silverado to Texas for business. When the Silverado began having engine issues, Larry Virgil took it to Lone Star to be repaired, and Lone Star has maintained possession of the Silverado ever since. The Debtor stated that he is unaware of a title for the Silverado in any state that is in Larry Virgil’s name. He claimed that he did register the Silverado in Texas, but he did so because it is a commercial vehicle and he uses it as a part of his business. The Debtor testified that he desires to keep the Silverado, and plans to pay the outstanding balance owed to Lone Star through his chapter 13 plan.

10. Lone Star entered the following exhibits into evidence at the June Hearing: (1) the Title and Registration Verification (Lone Star June Hr’g Ex. 1) from the Texas Department of Motor Vehicles (“DMV”) on March 16, 2017 (the “March Title Search”) showing that the Silverado is owned by Larry Virgil; (2) several documents that were sent to Larry Virgil, including (a) a Notice of Sale of Motor Vehicle to Satisfy Lien showing that Lone Star would sell the Silverado at public sale unless Larry Virgil rendered payment in the amount of \$7,179.00 (the “Notice of Sale”); (b) the March Title Search; (c) the Notice of Intention to File Mechanic’s Lien notifying Larry Virgil that Lone Star intended to obtain a mechanic’s lien in the amount of \$7,179.00 (the “Mechanic’s Lien”); and (d) the Mechanic Lien receipt (Lone Star Hr’g Ex. 2); (3) the Repair Order (Lone Star Hr’g Ex. 3) (the “Invoice”) evidencing the work that was necessary to repair the Silverado and the total amount of the charges; (4) an original certificate issued by the State of Texas showing the title history of the Silverado (the “Title History”), which includes (a) a Texas Title Application Receipt issued to Larry Virgil; (b) the Texas Title Application completed

by Larry Virgil (the “Texas Title Application”);⁶ (c) the Certified Automated Truck Scale; and the Mississippi Application for Certificate of Title (the “Mississippi Title Application”);⁷ and (5) the Certified Motor Vehicle Record Request Response (the “Certified Response”) (Lone Star Hr’g Ex. 5), which showed that Larry Virgil was the owner of the Silverado and that “Roger Dabbs Chevrolet” in Brandon, Mississippi, was the previous owner of the Silverado.

11. Sanchez, who stated that he is the president of Lone Star, testified at the June Hearing. He stated that he only interacted with Larry Virgil, who lived in Texas and brought the Silverado into Lone Star for repairs. Sanchez testified to the following set of facts: (a) after he inspected the Silverado and determined that it needed a new engine, Larry Virgil approved the repairs; (b) he requested that Larry Virgil make a down payment before he would begin working on the Silverado, but Larry Virgil “begged” him to begin the repairs without the down payment because he was out of state and would not be able to submit the down payment to Sanchez; (c) Larry Virgil pleaded with him to trust that he would pay for the repairs, and he performed the work because he figured that Larry Virgil would not abandon the Silverado given its value; (d) the cost of the engine repair totaled \$4,650.00, as evidenced by the Invoice; (e) after repairing the engine, he further inspected the Silverado and discovered that additional repairs were needed, which Larry Virgil approved; and (f) after all of the work was completed, the total owed to Lone Star was

⁶ The Texas Title Application, which was completed by Larry Virgil, provides that the previous owner of the Silverado was the dealer, “Roger Dabbs.” (Title App. at 1).

⁷ At the June Hearing, both Harrell and Fletcher agreed that the Mississippi Title was not in evidence. Upon reviewing the Title History, the Court discovered that although the Mississippi Title itself was not attached, the Mississippi Title Application was included in the title search and report conducted by the State of Texas. Thus, Lone Star entered the one document raising a question as to whether the Debtor ever owned the Silverado into evidence at the June Hearing.

\$7,179.00. According to Sanchez, he requested full payment from Larry Virgil multiple times, but has not received a single payment despite Larry Virgil's repeated promises to pay. He eventually obtained the Mechanic's Lien, as shown by the documents entered into evidence at the June Hearing as Lone Star Hearing Exhibit 2, and has maintained possession of the Silverado ever since. Sanchez also conducted a thorough title search, which showed that Larry Virgil was the owner of the Silverado, before obtaining the Notice of Sale. He was prepared to sell the Silverado and sent the documents contained in Lone Star Hearing Exhibit 2 to Larry Virgil when Larry Virgil informed him that he was "under federal protection." (Hr'g at 3:09:00).⁸ Sanchez did not know what this meant, but he has not sold the Silverado, and it remains in his possession.

12. Fletcher argued at the June Hearing that the Debtor testified that he is the owner of the Silverado and that he registered the Silverado in his company's name in Texas. According to Fletcher, it is unclear how title to the Silverado was transferred to Larry Virgil in Texas or that the Debtor even transferred title to Larry Virgil because Ally's lien should have showed up on any title search. Fletcher conceded, however, that the only evidence presented at the June Hearing showed that the Silverado was titled in Texas to Larry Virgil and that no evidence at the June Hearing shows that the Debtor owns the Silverado.⁹

13. At the June Hearing, Harrell contended that there is no evidence of a current, valid Mississippi title in the Debtor's name.¹⁰ According to Harrell, the evidence presented by Lone Star at the June Hearing shows that Larry Virgil currently possesses title to the Silverado in Texas.

⁸ The June Hearing was not transcribed. Citations are to the timestamp of the audio recording.

⁹ *See supra* note 7.

¹⁰ *Id.*.

Harrell also contended that the Debtor had the burden to prove that turnover is appropriate, which he failed to do. Further, if Lone Star releases the Silverado, it would lose the Mechanic's Lien under Texas law, according to Harrell. Thus, Harrell argued that Lone Star should be permitted to retain possession of the Silverado until the Mechanic's Lien is satisfied.

Discussion

At the June Hearing, the parties agreed that the Mississippi Title was not entered into evidence, and the Court noted from the bench that the only evidence showed that the Silverado is titled in Texas to Larry Virgil. In preparing this Order, however, the Court discovered that Lone Star entered the Mississippi Title Application, but not the Mississippi Title itself, into evidence as part of the Title History. Though neither party brought the Mississippi Title Application to the Court's attention, the Court retracts its statement from the bench that the only evidence presented at the June Hearing showed that the Silverado was titled in Larry Virgil's name in Texas. Nonetheless, the Court reaches the same conclusion it reached at the June Hearing: that the Debtor failed to meet his burden to prove by a preponderance of the evidence that the Silverado is property of the bankruptcy estate.

Section 542(a) requires all entities having "possession, custody, or control, during the case" of property of the estate to "deliver to the trustee, and account for, such property or the value of such property, unless such property is of inconsequential value or benefit to the estate." 11 U.S.C. § 542(a). To support a cause of action for turnover, the trustee, or, in the Bankruptcy Case, the Debtor, has the burden to prove the following elements by a preponderance of the evidence: "(1) the property is in the possession, custody, or control of a noncustodial third party; (2) the property constitutes property of the estate; (3) the property is of the type that the trustee could use, sell or lease pursuant to section 363 or that the debtor could exempt under section 522, and (4) that the

property is not of inconsequential value or benefit to the estate.” 5 COLLIER ON BANKRUPTCY ¶ 542.03 (16th ed. 2016). Only the second element is at issue in the Turnover Motion—is the Silverado property of the Debtor’s bankruptcy estate?

Section 1306 specifically states that property of the estate includes all property listed in § 541, which encompasses, with limited exceptions, “all legal or equitable interests of the debtor in property as of the commencement of the case.” 11 U.S.C. § 541(a). Accordingly, if the Debtor is unable to satisfy his burden to prove by a preponderance of the evidence that he possesses a legal or equitable interest in the Silverado and, therefore, that the Silverado is property of the estate, turnover should not be granted under § 542. The burden of proof in a turnover action under § 542 is on the party seeking the turnover. *Faulkner v. Kornman (In re Heritage Org., L.L.C.)*, 350 B.R. 733, 737-38 (Bankr. N.D. Tex. 2006); *Yaquinto v. Greer*, 81 B.R. 870, 876 (N.D. Tex. 1988). The party seeking turnover must establish a *prima facie* case to support the relief requested, specifically, that all four (4) elements of turnover are satisfied. *In re Donnell*, 357 B.R. 386, 396 (Bankr. W.D. Tex. 2006). If the party seeking turnover makes a *prima facie* showing that all four (4) elements are satisfied, the burden shifts to the opposing party to rebut the *prima facie* case or to establish a defense. *Williams v. Am. Bank of the Mid-Cities, N.A. (In re Williams)*, 61 B.R. 567, 570 (Bankr. N.D. Tex. 1986). The party seeking turnover has the ultimate burden of proof, as “the burden of proof is at all times upon the party seeking turnover.” *Yaquinto*, 81 B.R. at 877.

In the Adversary, the Debtor argued that the Silverado is property of the estate because he owns it, which he claimed is evidenced by the fact that he holds title to it in Mississippi. Lone Star argued that the Silverado is not property of the estate because it is owned by Larry Virgil in Texas, not the Debtor. Assuming the Debtor made a *prima facie* showing that all four (4) elements of turnover are satisfied, Lone Star met its burden to show that the Silverado is not

property of the estate because it is owned by Larry Virgil, not the Debtor. At the June Hearing, the Debtor entered no exhibits into evidence and relied solely on his own testimony. Lone Star, on the other hand, entered several exhibits into evidence at the June Hearing that demonstrate that, according to Texas's DMV records, Larry Virgil is the record owner of the Silverado and also relied on the testimony of Sanchez. The March Title Search provided by the Texas DMV shows that Larry Virgil is the owner of the Silverado. Additionally, the Title History, certified by the State of Texas, shows that Larry Virgil is the owner of the Silverado. Finally, the Certified Response, requested by Sanchez and certified by the Texas DMV, shows that Larry Virgil owns the Silverado and that Rogers Dabbs Chevrolet, not the Debtor, was the previous owner of the Silverado, raising a question as to whether the Debtor ever owned the Silverado. The Mississippi Title Application is also attached, however, which at least shows that the Debtor may have applied for the Mississippi Title. Even though the Mississippi Title Application is included in the Title History, the documents provided by the Texas DMV evidence the fact that Texas's records reflect that Larry Virgil owns the Silverado. The Debtor provided no evidence to refute Lone Star's evidence showing that title to the Silverado was transferred to Larry Virgil and that Larry Virgil is now the record owner of the Silverado in Texas. Accordingly, the Debtor failed to meet his ultimate burden of proving that the Silverado is property of the estate as required for turnover under § 542.

After considering the arguments of counsel, the documents entered into evidence at the June Hearing, and the testimony of the Debtor and Sanchez, the Court finds that the Debtor failed to satisfy his burden to prove that the Silverado is property of the estate. Clearly, there is a discrepancy between Texas and Mississippi records regarding who owns the Silverado. The Mississippi Title Application indicates that the Debtor may possess or may have previously

possessed title to the Silverado, but the Texas Title History indicates that Larry Virgil is the owner of the Silverado. The Debtor did not introduce any evidence to refute the Title History or the documentation provided to Sanchez by the State of Texas. Sanchez exercised due diligence in determining who owned the Silverado, and everything provided to him by the State of Texas indicated that Larry Virgil was the owner of the Silverado.

At this juncture, the Court is unable to conclude how Texas was able to transfer title to Larry Virgil. The Debtor had the burden to prove by a preponderance of the evidence that he, not Larry Virgil, owned the Silverado, making it property of the estate. The Court was presented with several documents, certified by the State of Texas, evidencing that Texas transferred title of the Silverado to Larry Virgil. Having been presented with this documentary evidence from the State of Texas, and no evidence from the State of Mississippi other than the Mississippi Title Application, it is clear that the Debtor failed to prove by a preponderance of the evidence that the Silverado is property of the estate. Accordingly, the Court cannot order turnover of the Silverado. Nothing in this Order should be construed as a determination as to who is the legal owner of the Silverado.¹¹ The Court finds only that the Debtor failed to meet his burden under § 542 for purposes of the Turnover Motion. Accordingly, the Turnover Motion should be denied. Because there are no remaining matters pending in the Adversary, the Court finds that the Adversary should be dismissed.

¹¹ The Court also makes no determination as to the status of Ally's lien on the Silverado as outlined in the Ally POC. Because it is unclear who possesses legal ownership of the Silverado and whether title of the Silverado was properly or legally transferred to Larry Virgil, the fate of Ally's lien is in question.

IT IS, THEREFORE, ORDERED that the Turnover Motion is hereby denied.

IT IS FURTHER ORDERED that the Adversary is hereby dismissed.

##END OF ORDER##