

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE SOUTHERN DISTRICT OF MISSISSIPPI
EASTERN DIVISION

US BANKRUPTCY COURT
SOUTH DISTRICT OF MS
FILED

JUN 11 10 03 AM '93

IN RE:

HEARD FAMILY TRUCKING, INC.

HOLLIE C. JONES, CLERK
BY SA DEPUTY
~~RELIEF PROCESSED~~
CASE NO. 91-3291MC

MOTION NO. 911177

Craig M. Geno
P.O. Box 2990
Jackson, MS 39207

Attorney for Debtor &
Attorney for Trustee

Thomas E. Schwartz
P.O. Drawer 1975
Hattiesburg, MS 39403

Attorney for Trustee

J.C. Bell
P.O. Box 566
Hattiesburg, MS 39401

Chapter 7 Trustee

T. Calvin Wells
P.O. Box 1970
Jackson, MS 39215-1970

Attorney for Orix
Credit Alliance, Inc.

Edward Ellington, Bankruptcy Judge

MEMORANDUM OPINION

This contested matter came on for hearing upon the Motion for Relief from the Automatic Stay or in the Alternative for Adequate Protection filed by Orix Credit Alliance, Inc. The motion seeks relief from the automatic stay so that Orix may proceed under applicable state law against two utility trailers and one Freightliner truck in which Orix claims to hold a perfected first priority security interest. By agreement of the parties the Freightliner truck has been sold, and any lien held by Orix attached to the proceeds from the sale of the truck. The Chapter 7 Trustee opposes the motion for relief as it relates to the sale

proceeds on the basis that Orix did not properly perfect its security interest in the truck, and therefore, does not have an interest in the sale proceeds superior to the Trustee's interest.

By agreement of the parties, this opinion deals solely with the issue of whether the secured claim of Orix against the Freightliner truck was properly perfected at the time Heard filed its petition for relief so as to defeat the "strong-arm powers" provided to the Trustee or Debtor-in-Possession under §§ 544 and 1107 of the Bankruptcy Code¹. After considering the evidence presented at trial along with the arguments of counsel, this Court holds that Orix did not properly perfect its security interest in the Freightliner truck, and therefore is not entitled to relief from the automatic stay as it relates to the proceeds from the sale of the truck. In so holding, the Court makes the following findings of fact and conclusions of law.

FINDINGS OF FACT

The Debtor, Heard Family Trucking, Inc. is a Mississippi corporation with its principal place of business in Brooksville, Mississippi. Sam R. Heard, Jr. has been the sole shareholder of Heard Family Trucking since its incorporation in 1989. Mr. Heard operated the company as a sole proprietorship prior to its incorporation. At trial, Mr. Heard testified that Brooksville,

¹ Hereinafter, all code sections refer to the Bankruptcy Code found at Title 11 of the United States Code unless specifically noted otherwise.

Mississippi has always been the Debtor's principal place of business.

On March 31, 1990 Heard Family Trucking executed a conditional sales contract note in favor of Columbus White Truck Sales, Inc. d/b/a Columbus Truck Center for the purchase of a 1990 Freightliner truck. Columbus Truck Center is located in Columbus, Mississippi. The sales contract lists Route 1 Box 81, Brooksville, Mississippi as the address of Heard Family Trucking, and states that the truck "shall be located and kept for use at" the same Brooksville address. On the same day, the sales contract was assigned to Orix Credit Alliance, Inc. The assignment also lists on its face the address of Heard Family Trucking as Route 1 Box 81, Brooksville, Mississippi.

On June 13, 1990 a certificate of title for the Freightliner truck was issued by the State of Alabama Department of Revenue. The certificate of title lists Heard Family Trucking as the owner of the truck, but lists an address in Kennedy, Alabama as the mailing address of Heard Family Trucking. Mr. Heard testified at trial that the Kennedy, Alabama address is incorrect, and that he has no knowledge of how that address was acquired, or why the truck was titled in Alabama. Mr. Heard further testified that while he is familiar with the trucking agency located at the Kennedy, Alabama address appearing on the certificate of title, he has never used that address, nor has he ever hauled goods from that agency. Finally, the payment book for the Freightliner truck that

Orix sent to Heard Family Trucking listed the Debtor's address as Route 1 Box 81, Brooksville, Mississippi.

At trial no evidence was presented by Orix or the Debtor to explain why the certificate of title was issued in Alabama or how the Kennedy, Alabama address was acquired. Although Orix presented to the Court possible reasons the Alabama certificate of title containing the Alabama address may have been issued, these reasons amount to mere speculation and do not offer an explanation based on facts in evidence.

On September 3, 1991 Heard Family Trucking filed a petition for relief under Chapter 11 of the Bankruptcy Code. Orix filed the present motion for relief from the automatic stay as to the Freightliner and two utility trailers in October, 1991. A hearing regarding only the Freightliner truck took place in February, 1992.

In July, 1992 an order was entered converting the case from chapter 11 to chapter 7, and J.C. Bell was appointed as the Chapter 7 Trustee. In February, 1993 an agreed order was entered lifting the automatic stay as to the Freightliner truck allowing Orix to sell the truck, with any lien attaching to the sale proceeds pending the outcome of the present motion by Orix to lift the automatic stay.

CONCLUSIONS OF LAW

The sole issue before the Court is whether the security interest of Orix in the Freightliner truck was properly perfected

at the time Heard Family Trucking filed its petition for relief under the Bankruptcy Code. If Orix's security interest in the Freightliner truck was properly perfected at the time the Debtor filed its petition for relief, then its security interest is superior to the Trustee's interest in the truck, and Orix would possibly be entitled to relief from the automatic stay. If, however, the security interest of Orix in the Freightliner truck was not perfected at the time the Debtor filed its petition for relief, then the Trustee's interest in the truck is superior to the security interest held by Orix, by virtue of the "strong-arm powers" provided to the Trustee pursuant to § 544 of the Bankruptcy Code and Miss. Code Ann. § 75-9-301(1)(b) (Supp. 1992).

Section 544 of the Bankruptcy Code provides in relevant part as follows:

11 USC § 544

§ 544. Trustee as lien creditor and as successor to certain creditors and purchasers.

(a) The Trustee shall have, as of the commencement of the case, and without regard to any knowledge of the trustee or of any creditor, the rights and powers of, or may avoid any transfer of property of the debtor or any obligation incurred by the debtor that is voidable by-

(1) a creditor that extends credit to the debtor at the time of the commencement of the case, and that obtains, at such time and with respect to such credit, a judicial lien on all property on which a creditor on a simple contract could have obtained such a judicial lien, whether or not such a creditor exists;

(2) a creditor that extends credit to the debtor at the time of the commencement of the case, and obtains, at such time and with respect to such credit, an execution against the debtor that is returned unsatisfied at such time, whether or not such a creditor exists; or

(3) a bona fide purchaser of real property, other than fixtures, from the debtor, against whom applicable law permits such transfer to be perfected, that obtains the status of a bona fide purchaser and has perfected such transfer at the time of the commencement of the case, whether or not such a purchaser exists.

As previously stated, Heard Family Trucking originally commenced its case under Chapter 11 of the Bankruptcy Code, and Orix filed its motion for relief from the automatic stay prior to the Debtor's conversion to chapter 7. Section 1107 of the Bankruptcy Code confers upon a debtor-in-possession, among other things, those powers provided by § 544.² Upon conversion of the case from chapter 11 to chapter 7, the Chapter 7 Trustee, J.C. Bell, replaced the Debtor-in-Possession as the representative of the estate, but the date of the commencement of the case remains September 3, 1991.³

² § 1107. Rights, powers, and duties of debtor in possession.

(a) Subject to any limitations on a trustee serving in a case under this chapter, and to such limitations or conditions as the court prescribes, a debtor in possession shall have all the rights, other than the right to compensation under section 330 of this title, and powers, and shall perform all the functions and duties, except the duties specified in sections 1106(a)(2), (3), and (4) of this title, of a trustee serving in a case under this chapter.

(b) Notwithstanding section 327(a) of this title, a person is not disqualified for employment under section 327 of this title by a debtor in possession solely because of such person's employment by or representation of the debtor before the commencement of the case.

³ 11 USC § 348. Effect of conversion.

(a) Conversion of a case from a case under one chapter of this title to a case under another chapter of this title constitutes an order for relief under the chapter to which the case is converted, but, except as provided in subsections (b) and (c) of this section, does not effect a change in the date of the filing of the petition, the commencement of the case, or the order for relief.

Pursuant to § 544 the Trustee has a judicial lien on the Freightliner truck as of September 3, 1991, the day Heard Family Trucking filed its petition for relief. If under Mississippi law the Trustee, as a creditor with a judicial lien, has a superior interest to that of Orix, then the Trustee will prevail.

[S]ection 544(a) confers upon the trustee a status with the consequent power and capacity to act to invalidate transfer, just as if he were in actuality a bona fide purchaser of real property from the debtor or a creditor of the kind to which the provision refers. Wherever under the applicable law such a creditor or bona fide purchaser might prevail over prior transfers, liens, encumbrances or the like, the trustee will also prevail.

4 Collier On Bankruptcy, ¶ 544.01 (Lawrence P. King, et al. eds., 15th ed. 1993) (footnote omitted).

Miss. Code Ann. § 11-7-191 (1972) governs the creation of a judicial lien in Mississippi, providing as follows:

§ 11-7-191. Lien of enrolled judgment.

A judgment so enrolled shall be a lien upon and bind all the property of the defendant within the county where so enrolled, from the rendition thereof, and shall have priority according to the order of such enrollment, in favor of the judgment debtor and all persons claiming the property under him after the rendition of the judgment. A judgment shall not be a lien on any property of the defendant thereto unless the same shall be enrolled. In counties having two judicial districts, a judgment shall operate as a lien only in the district or districts in which it is enrolled.

Having determined that the Bankruptcy Code confers upon the Trustee the status of a creditor holding a judicial lien on the Freightliner truck as of the commencement of the Debtor's case and that Miss Code Ann. § 11-7-191 (1972) sets forth the rights under

Mississippi law of a judicial lien holder, the Court next must look to Mississippi law to determine the status of Orix's secured claim against the truck, and further to determine whether that status is superior to the Trustee's status as a judicial lien creditor.

Although Mississippi has enacted article 9 of the Uniform Commercial Code⁴, the provisions of The Mississippi Motor Vehicle Title Law⁵ control the perfection of Orix's security interest in the Freightliner truck. The exclusivity of The Mississippi Motor Vehicle Title Law as it relates to the perfection of security interests in motor vehicles is set forth in Miss. Code Ann. § 63-21-55 (1972), which provides as follows:

§ 63-21-55. Exclusiveness of procedure for perfecting and filing notice of security interests.

Except as provided in 63-21-53, the method provided in this chapter of perfecting and giving notice of security interests subject to this chapter is exclusive. Security interests subject to this chapter are hereby exempted from the provisions of law which otherwise require or relate to the filing and recording of instruments creating or evidencing security interests.

Furthermore, the Mississippi Supreme Court has specifically found that the provisions of the Mississippi Motor Vehicle Title Law, and not the provisions of the Mississippi Commercial Code, are controlling in determining whether a security interest in a motor vehicle is perfected under Mississippi law. Memphis Bank & Trust v. Pate, 362 So.2d 1245, 1248 (Miss. 1978).

⁴ Miss. Code Ann. §§ 75-9-101 to -114 (1972 & Supp. 1992).

⁵ Miss. Code Ann. §§ 63-21-1 to -77 (1972 & Supp. 1992).

The required method of perfecting a security interest in a motor vehicle under Mississippi law is set forth in Miss. Code Ann. § 63-21-43 (1972), which states in pertinent part as follows:

§ 63-21-43. Perfection of security interests.

(1) Unless excepted by section 63-21-41, a security interest in a vehicle of a type which a certificate of title is required is not valid against creditors of the owner or subsequent transferees or lienholders of the vehicle unless perfected as provided in this chapter.

(2) A security interest is perfected by the delivery to the comptroller of the existing certificate of title, if any, an application for a certificate of title containing the name and address of the lienholder and the date of his security agreement, and the required fee.

(3) If a vehicle is subject to a security interest when brought into this state, the validity of the security interest is determined by the law of the jurisdiction where the vehicle was when the security interest attached, subject to the following:

- (a) If the parties understood at the time the security interest attached that the vehicle would be kept in this state and it was brought into this state within thirty (30) days thereafter for purposes other than transportation through this state, the validity of the security interest in this state is determined by the law of this state.
- (b) If the security interest was perfected under the law of the jurisdiction where the vehicle was when the security attached, the following rules apply:
 - (i) If the name of the lienholder is shown on an existing certificate of title issued by that jurisdiction, his security interest continues perfected in this state.
 - (ii) If the name of the lienholder is not shown on an existing certificate of title

(emphasis added).

Orix takes the position that its security interest in the Freightliner truck is properly perfected in accordance with the

terms of § 63-21-43(3). The Trustee disagrees on the basis that the truck was not brought into Mississippi after attachment of the security interest, but instead the truck was bought in Mississippi and the security interest attached in Mississippi.

Clearly, where a vehicle is brought into Mississippi subsequent to the attachment of a security interest in the vehicle, subsection (3) of § 63-21-43 provides that the validity of the security interest is determined by the law of the state where the security interest attached, unless the parties understood at the time of attachment that the vehicle would be kept in Mississippi. In the latter situation, Mississippi law determines the validity of the security interest.

Furthermore, if the security interest was perfected under the law of the state where the vehicle was located when the security interest attached and a certificate of title showing the lienholder was issued by that state, then perfection of the security interest continues in Mississippi.

However, the Freightliner truck was not brought into Mississippi after the security interest of Orix had attached in another state. On the contrary, the truck was purchased in Columbus, Mississippi from a Mississippi dealer. All evidence presented to the Court shows that Heard Family Trucking is a Mississippi corporation with its principal place of business in Brooksville, Mississippi. The security interest could have attached nowhere other than Mississippi, therefore, subsection (3) of § 63-21-43 is inapplicable to Orix's security interest.

Even if the Court were to ignore the fact that the truck was not brought into Mississippi after attachment of the security interest, § 63-21-43(3)(a) provides that where the parties knew at the time the security interest attached the vehicle would be kept in Mississippi, and the vehicle was in fact brought into Mississippi within 30 days after attachment of the security interest, Mississippi law determines the validity of the security interest as against third parties. The sales contract specifically states on its face that the truck "shall be located and kept for use at: Rt. 1 Box 81 Brooksville, Noxubee, MS."

In support of its position that its security interest in the Freightliner truck was perfected at the time the Debtor filed its petition for relief, Orix cites two cases, neither of which are applicable to the present case.

First, Orix cites General Motors Acceptance Corp. v. Pongetti (In re Partain), 351 F.Supp. 750 (N.D. Miss. 1972) to support the proposition that where a security interest in a motor vehicle is acquired in a state other than Mississippi, and a certificate of title evidencing the lienholder is issued by that state, the security interest remains perfected after the vehicle is brought into Mississippi. While the Court does not disagree with the foregoing statement, it is inapplicable to the present case because the Freightliner truck was purchased in Mississippi. Furthermore, the Partain case involved an automobile that was purchased in Alabama and originally kept in Alabama prior to the enactment of Alabama's certificate of title laws. Consequently, no

certificate of title had been issued when the automobile was subsequently brought into Mississippi. The court found that the security interest in the automobile was not perfected under Mississippi law.

Orix next cites Sczepanski v. General Motors Acceptance Corp. (In re McClintock), 571 F.2d 317 (5th Cir. 1978) to support its position. McClintock involved a situation where a motor vehicle was purchased in Illinois and titled in Illinois even though the purchaser informed the automobile dealer that the automobile would be brought into Georgia within 30 days after the purchase. A Georgia certificate of title was never obtained. The Fifth Circuit Court of Appeals certified the question to the Georgia Supreme Court, which held that pursuant to Georgia law the security interest continued to be perfected after the automobile was brought into Georgia. McClintock v. General Motors Acceptance Corp., 241 S.E.2d 831 (Ga. 1978). Orix argues that because the wording of the Georgia statute in question is the same as the wording of Miss. Code Ann. § 63-21-43(3)(1972) that this Court should reach the same result. However, this Court disagrees because, again, the Freightliner truck was not purchased in Alabama, and Orix's security interest did not attach in the state of Alabama.

In light of the evidence presented at trial, this Court holds that pursuant to The Mississippi Motor Vehicle Title Law, in order for Orix's security interest in the Freightliner truck to be perfected, its lien had to be evidenced on a certificate of title

issued by the State of Mississippi. Since the certificate of title issued by the State of Alabama is ineffective to perfect the security interest of Orix in Mississippi, Orix occupies the position of an unperfected secured creditor.

Finally, the Court must determine whether as an unperfected secured creditor Orix's claim against the Freightliner truck is superior or inferior to the Trustee's claim against the truck as a judicial lien creditor from and after September 3, 1991.

Miss. Code Ann. § 75-9-301(1)(b) (Supp. 1992) provides in relevant part as follows:

§ 75-9-301. Persons who take priority over unperfected security interests; right of "lien creditor".

(1) Except as otherwise provided in subsection (2), an unperfected security interest is subordinate to the rights of:

...
(b) A person who becomes a lien creditor before the security interest is perfected;
....

In light of the above statute, as an unperfected secured creditor, Orix holds an interest in the Freightliner truck that is inferior to the Trustee's interest in the truck as a judicial lien creditor.

CONCLUSION

This Court holds that the security interest of Orix Credit Alliance, Inc. in the Freightliner truck owned by Heard Family Trucking, Inc. was not perfected on September 3, 1991, the date Heard Family Trucking filed its petition for relief under the

Bankruptcy Code. Pursuant to § 544 of the Bankruptcy Code, the Trustee is granted the status of a creditor holding a judicial lien against the Freightliner truck as of September 3, 1991, and therefore, the Trustee has an interest in the truck superior to the security interest of Orix. Accordingly, Orix is not entitled to relief from the automatic stay in order to proceed under Mississippi law against the proceeds from the sale of the truck, and its request for relief will be denied.

A separate judgment consistent with this opinion will be entered in accordance with Rules 7054 and 9021 of the Federal Rules of Bankruptcy Procedure.

Dated this the 17th day of June, 1993.


UNITED STATES BANKRUPTCY JUDGE

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE SOUTHERN DISTRICT OF MISSISSIPPI
EASTERN DIVISION

US BANKRUPTCY COURT
SOUTH DISTRICT OF MS
FILED

JUN 11 10 03 AM '93

IN RE:

HEARD FAMILY TRUCKING, INC.

MOLLIE S. JONES, CLERK
BY DEPUTY
~~RELIEF ORDERED~~

CASE NO. 91-3291MC

MOTION NO. 911177

FINAL JUDGMENT

Consistent with the opinion dated contemporaneously herewith, it is hereby ordered and adjudged that the motion filed by Orix Credit Alliance, Inc. seeking relief from the automatic stay in order to proceed under applicable state law against the proceeds from the sale of one Freightliner truck in which it holds a security interest is hereby denied.

This Court makes no ruling regarding the two utility trailers which also are the subject of Orix's motion for relief from the automatic stay. The motion as it pertains to the two utility trailers will be set for hearing at a later date.

This is a final judgment as to the Freightliner truck for the purposes of Rules 7054 and 9021 of the Federal Rules of Bankruptcy Procedure.

ORDERED AND ADJUDGED this the 11 day of June, 1993.


UNITED STATES BANKRUPTCY JUDGE