Not intended for publication

Dated: January 21, 2004
The following is SO ORDERED.

G. Harvey Boswell
UNITED STATES BANKRUPTCY JUDGE

United States Bankruptcy Court
Western District of Tennessee
Eastern Division

In re

James and Kimberly Daniels, **Case no. 02-13028**

Debtors. **Chapter 11**

Memorandum Opinion and Order re Objection to Claims of Roberts-Gibson, Inc.

At issue in this case are two pre-petition claims filed by Roberts-Gibson, Inc., on October 24, 2002. The debtor filed objections to these claims on June 11, 2003. The Court conducted a hearing on the debtors' objections on December 3, 2003. FED. R. BANKR. P. 9014. Pursuant to 28 U.S.C. § 157(b)(2)(A), this is a core proceeding. The Court has reviewed the testimony from the hearing and the record as a whole. This Memorandum Opinion and Order shall serve as the Court's findings of facts and conclusions of law. FED. R. BANKR. P. 7052.

I. Findings of Fact

The debtors, James and Kimberly Daniels filed for chapter 11 relief on July 10, 2002. Prior to that time, James Daniels (hereinafter "Daniels" or "debtor")[1] operated two Amoco stations in Dyersburg, Tennessee: Northside Amoco and Daniels Amoco. Northside Amoco was in business from 1987 until September 1997. Daniels Amoco was in business from 1988 until September 6, 2000. During the

[1]At the hearing on the debtors' objection to Roberts-Gibson's claims, the parties stipulated that Kimberly Daniels is not obligated on either of the two claims.

entire time the two Amoco stations were in business, Daniels purchased the gasoline he sold to consumers at his gas stations from Roberts-Gibson, Inc. (hereinafter "RGI").

On October 24, 2002, RGI filed two proofs of claims in this case: one for $188,739.14 (hereinafter "claim 1") and one for $26,085.53 (hereinafter "claim 2"). Both claims were filed as secured ones. RGI listed "accounts receivable" as the collateral for claim 1 and "products delivered on assignment and sold without payment" as collateral for claim 2. According to the evidence presented at the trial, claim 1 arose out of business dealings RGI had with both Northside Amoco and Daniels Amoco. Claim 2 arose out of RGI's dealings with Daniels Amoco only. The Court will discuss each claim separately.

A. Claim 1

While the debtor operated his Amoco stations, he entered into three promissory notes and two security agreements with RGI.[2] The first note was executed on December 27, 1991, in the principal amount of $150,000. According to the terms of the note, the loan matured on December 25, 1994 and was secured by "security agreement and UCC-1 dated 12-27-91." The security agreement listed the collateral for the first note as "all inventory, accounts receivable, equipment, furniture and fixtures of the debtor, now owned or hereafter acquired, etc." RGI renewed the first note on December 29, 1994, in the amount of $129.680.23. This second note matured on December 25, 1997.

The third promissory note was executed on December 29, 1994, in the principal amount of $101,344.19. This note matured on December 29, 1997 and was secured by "security agreement and UCC-1s dated 12-29-94." The December 29, 1994, security agreement listed the collateral for the third note as "all inventory, accounts receivable, equipment, furniture and fixtures of the debtor, now owned or hereafter acquired located at Northside Amoco Truck Stop, 1981 St. John Avenue, Dyersburg, TN and Daniels Amoco Food Stop #202, Hwy 78 North, Dyersburg, TN. When Daniels closed Northside Amoco in September 1997, RGI took possession of the station's assets including computers, desks, and chairs. RGI put this property in storage where it remains to this day.

The debtor filed an objection to claim 1 on June 11, 2003. In his objection, Daniels alleged that the claim was, at best, a general unsecured claim. At the hearing in this matter, the debtor further alleged that the claim was barred by the statute of limitations. RGI stipulated to the unsecured nature of the claim at the December 3rd ; however, RGI disagreed with the debtor's statute of limitations allegation.

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[2]RGI attached the three promissory notes and the two security agreements to its proof of claim for claim 1. At the hearing in this matter, RGI introduced the UCC-1s as Trial Exhibit 2.

B. Claim 2

Claim 2 arises out of three allegedly unpaid invoices for gasoline RGI delivered to Daniels Amoco in March and September 2000. Claim 2 was originally filed as a secured claim in the amount of $26,085.53; however, at the hearing in this matter, RGI stipulated that it would waive the late charges and fees and amend its claim to $23,514.92. RGI attached three invoices to their proof of claim. The first invoice, number E328771 is dated March 1, 2000, and shows the amount due on gasoline as $5,192.81. Under the heading "terms of sale" at the bottom of the invoice, a box labeled "credit sale" is checked. The second invoice, number E34427, is dated September 4, 2000, and shows a total due of $17,789.18. Once again, the "credit sale" box is checked. The third and final invoice, number E34428, is dated September 6, 2000, and shows a total due of $532.93. None of the boxes under "terms of sale" are checked on this invoice.[3] Additionally, the debtor did not sign any of these invoices.

Over the course of their thirteen year business relationship, RGI and Daniels conducted business in a consistent manner. RGI would go to Memphis and pick up gasoline in their trucks. The RGI trucks would then take the gasoline to Daniels' stations and put the gasoline in the ground. Daniels would sell the gas to the public at his stations and would collect the money from customers. The meters on the pumps were read once a week by an RGI employee. Based on these readings, RGI would figure the total amount due and present Daniels with an invoice at the end of every week. Daniels would then pay the amount shown on the invoice less his commission and credit card sales for the week.

In late August of 2000, Daniels realized that he was not going to be able to continue operating Daniels Amoco. He contacted RGI's president Larry Gibson (hereinafter "Gibson") and told him he was going to have to close the station. Gibson expressed an interest in buying the station and told Daniels he would need time to make the necessary financial arrangements. In light of this decision, Gibson and Daniels agreed to deviate from their normal practice of accounting for and paying for gasoline on a week-by-week basis. Instead, the parties agreed that Daniels would begin remitting the gasoline deposits to RGI's office on a daily basis. RGI would then deposit the money at Union Planters. Both parties testified that Daniels complied with this request.

On September 6, 2000, the parties entered into an agreement whereby the debtor surrendered his leasehold interest in Daniels Amoco to RGI as of September 6, 2000 at 6:00 p.m. RGI prepared the typed portion of the agreement which reads as follows:

> I hereby voluntarily surrender possession of my leasehold interest in the real property and improvements known as Daniel's Amoco Food Shop, 2555 Lake Road, Dyersburg,

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[3] In addition to the three invoices attached to the proof of claim for claim 2, RGI also attached an "Owner-Dealer certification of gallonage" showing pump meter readings at Daniels Amoco for August 28, 2000, and September 4, 2000.

> TN, effective the 6th day of September 2000 at 6:00 p.m. and authorize Roberts-Gibson, Inc. to take possession thereof.

Immediately below the typed portion of the agreement is a handwritten portion which reads:

> Additionally all equipment inventory accounts and all other assets located at this location. This is made for the consideration of payment to Union Planters Bank and Ed Daniels in the amount of $15,000.00.

Both Daniels and Gibson initialed the handwritten portion of the agreement, but both also allege that it is not their handwriting. The parties believe it was written by a representative from Union Planters who was at the September 6, 2000, meeting. Daniels and Gibson both signed the agreement.

The parties differ as to the meaning of the September 6, 2000, agreement. RGI alleges that the gas sold during the week immediately prior to the closing of Daniels Amoco was held by the debtor on a consignment basis and, therefore, gave rise to a secured debt. The debtor disagrees with this allegation and instead asserts that the debt is an unsecured one. At the hearing in this matter, the debtor asserted that the term "consignment" was never used by the parties during their thirteen years of doing business nor are there any documents which prove that the debtor gave a lien on the gasoline to RGI.

II. Conclusions of Law

A. Claim 1

Because RGI stipulated at the hearing that they agree that claim 1 is an unsecured claim, the only issue for the Court to decide is whether or not the claim is barred by the statute of limitations. T.C.A. § 47-3-118(a) provides as follows:

> Except as provided in subsection (e), an action to enforce the obligation of a party to pay a note payable at a definite time must be commenced within six (6) years after the due date or dates stated in the note or, if a due date is accelerated, within six (6) years after the accelerated due date.

T.C.A. § 47-3-118(a). In the case at bar, the notes matured in December 1997. Pursuant to § 47-3-118(a), RGI had until December 2003 to commence an action against Daniels to enforce the notes; however, when the debtors filed chapter 11 on July 10, 2002, 11 U.S.C. § 362(a)(1) suspended RGI's rights to commence a collection action against the debtor without first seeking relief from the automatic stay. Additionally, § 108 of the Bankruptcy Code provides that any "nonbankruptcy law" statute of limitations which has not expired prior to the filing of bankruptcy is tolled until (1) the statute of limitations expires under nonbankruptcy law or (2) thirty days after the automatic stay is terminated or expires, *whichever is later.* 11 U.S.C. § 108(c) , emphasis added. It is clear from these provisions that claim 1 is not barred by the statute of limitations. The Court will allow the claim as an unsecured one.

B. Claim 2

Proofs of claims which comply with Bankruptcy Rule 3001 "constitute prima facie evidence of the validity and amount of the claim." FED. R. BANKR. P. 3001(f). Subsection (d) of Rule 3001 requires a creditor claiming a security interest in property of the debtor to attach evidence that such security interest has been perfected further to their proof of claim. FED. R. BANKR. P. 3001(d). Some courts have found that a proof of claim which does not comply with Rule 3001(d) lacks prima facie evidence of validity. *Ashford v. Consolidated Pioneer Mortgage (In re Consolidated Pioneer Mortgage),* 178 B.R. 222, 227 (9th Cir. BAP 1995).

In the case at bar, RGI did not attach any evidence to its proof of claim that a security interest in the gasoline even existed, let alone was perfected. RGI simply claimed that the fuel Daniels Amoco sold during the last week of operation was held by the debtor on a consignment basis. No evidence was introduced at the hearing that a consignment relationship existed between RGI and Daniels. None of the requirements under Tennessee law on consignments appear to have been met. Coming into court and saying a security interest exists without introducing any kind of evidence of such an interest does not satisfy the burden of proof in this case.

III. Order

It is therefore **ORDERED** that the Debtors' Objection to Claims filed by Roberts-Gibson, Inc., are **SUSTAINED.** Roberts-Gibson, Inc.'s shall be allowed as follows:

1. Claim 1 in the amount of $188,739.14 shall be allowed as a General Unsecured Claim.
2. Claim 2 in the amount of $23,514.92 shall be allowed as a General Unsecured Claim.

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