

UNITED STATES BANKRUPTCY COURT  
WESTERN DISTRICT OF TENNESSEE  
WESTERN DIVISION

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In re

ATS RESEARCH, INC.,

Case No. 95-29315-L

Debtor.

Chapter 7

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**MEMORANDUM**

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Before the Court are objections filed by Norman P. Hagemeyer, Trustee for ATS Research, Inc., to proofs of claim filed by Pinnacle Press, Inc. ("Pinnacle") and Gordon Johnson. Both creditors assert that their claims are secured by judicial liens upon property of the estate. The Trustee asserts that the claimed liens never were perfected. The Court conducted a consolidated hearing to consider these objections on June 24, 1998. This is a core proceeding. 28 U.S.C. § 157(b)(2)(I). This memorandum contains the Court's findings of fact and conclusions of law pursuant to FED. R. BANKR. P. 7052.

**I. THE CLAIM OF PINNACLE PRESS**

**A. Facts**

Pinnacle filed a proof of claim in the amount of \$84,487.77 based on a judgment entered in Chancery Court of Shelby County, Tennessee on May 24, 1991. Pinnacle takes the position that the judgment is secured by a judgment or garnishment lien upon funds which are either now or may in the future be owed to the Debtor by Floratine Products Group, Inc. ("Floratine") pursuant to a Licensing Agreement dated January 15, 1991.

From the exhibits it appears that summary judgment was rendered in favor of Pinnacle and against the Debtor in the amount of \$59,178.91, together with costs, on May 24, 1991. *See* Trial Exhibit 2 (hereinafter “Tr. Ex.”) On August 30, 1991, Pinnacle filed a “Creditor’s Statement of Judgment Debtor’s Last Known Address for Requesting the Issuance of Execution or Garnishment.”

A Writ of Garnishment was issued and executed by Alton C. Gilless, Jr., Sheriff, by delivering a copy of the Garnishment to William Byrnes, president of Floratine on September 11, 1991. *See* Tr. Ex. 8.

The Licensing Agreement calls for Floratine to pay ATS royalties on a quarterly basis arising out of its marketing and sale of ATS products. The first payment under the Licensing Agreement apparently came due on May 21, 1991. *See* Tr. Ex. 6. At that time, Floratine had already received a Notice of Federal Tax Lien which had been recorded against ATS. Pursuant to that Notice, all payments due to ATS under the Licensing Agreement were forwarded to the Internal Revenue Service. Shortly before the Trustee’s objections were filed with respect to the claims of Pinnacle and Mr. Johnson, the Debtor’s tax liability was fully satisfied. At that time, it became important to determine the relative priorities of the Trustee and the creditors to the remaining royalty payments.

The parties have stipulated to the following additional facts:

1. No Answer was filed by Floratine to Pinnacle’s garnishment;
2. No steps were taken by Pinnacle to obtain a conditional judgment against Floratine;
3. No funds were ever paid into Chancery Court by Floratine;

4. There were no court hearings which took place subsequent to the issuance of Pinnacle's garnishment to Floratine.

### **B. Analysis**

Pinnacle takes the position that the mere entry of its judgment created a "judicial lien" entitled to priority over the rights and interest of the Trustee. Pinnacle relies upon 11 U.S.C. § 101(36) which provides: "[J]udicial lien' means lien obtained by judgment, levy, sequestration, or other legal or equitable process or proceeding." Pinnacle misapprehends the effect of this definition. The Supreme Court has made clear that "Congress has generally left the determination of property rights in the assets of a bankrupt's estate to state law." *Butner v. United States*, 440 U.S. 48, 54 99 S. Ct. 914, 918, 59 L. Ed. 2d 136 (1979). As the Supreme Court further explained in *Butner*:

Property interests are created and defined by state law. Unless some federal interest requires a different result, there is no reason why such interests should be analyzed differently simply because an interested party is involved in a bankruptcy proceeding. Uniform treatment of property interests by both state and federal courts within a State serves to reduce uncertainty, to discourage forum shopping, and to prevent a party from receiving "a windfall merely by reason of the happenstance of bankruptcy."

*Id.* at 55, 99 S. Ct. at 918 (quoting *Lewis v. Manufacturers Nat'l Bank*, 364 U.S. 603, 609, 81 S. Ct. 347, 350, 5 L. Ed. 2d 323 (1961)).

All that section 101(36) provides is that the term "judicial lien" as used in title 11 of the United States Code includes judgment liens. The Court must look to state law to determine the

existence of a judgment lien. Because the judgment was entered by a court of the state of Tennessee, the determination of whether a judgment lien exists is made pursuant to Tennessee law.

In Tennessee, the mere entry of a judgment creates no lien with respect to the debtor's property, either real or personal. Rather an additional step is required. A judgment creditor may obtain a judgment lien upon the debtor's real property by registering a certified copy of the judgment in the lien book in the register's office of the court where the land is located. TENN. CODE ANN. § 25-5-101(b) (Supp. 1997). A judgment creditor may obtain a judgment lien upon the debtor's equitable interest in real estate or other property by registering a certified memorandum or abstract of the judgment in the register's office where the real estate is located. *See* TENN. CODE ANN. § 25-5-102 (1980). A judgment creditor may obtain an execution lien upon the debtor's legal or equitable interest in stock, choses in action, or other personal property, not liable at law, by registering an abstract or memorandum of the judgment in the county where the debtor resides, if he lives in Tennessee, within sixty days from the rendition of the judgment. TENN. CODE ANN. § 25-5-103 (1980). With respect to personal property liable to execution at law, including the choses in action of a corporation, an execution lien attaches from the date a writ of execution is issued by a court of record. *See Smith v. United States Fire Ins. Co.*, 126 Tenn. 435, 150 S.W. 97 (1912); TENN. CODE ANN. § 26-3-103 (1980).

The liens described in sections 25-5-101 and 25-5-103 are lost if the judgment creditor fails to file a bill in equity to subject the debtor's interest within thirty days after the return of the

execution unsatisfied. *See* TENN. CODE ANN. § 25-5-104 (1980); *see also Coffey v. Southeastern Energy, Inc. (In re Coffey)*, 21 B.R. 804, 806 (Bankr. E.D. Tenn. 1982); *Bodin Apparel, Inc.*, 614 S.W. 2d 571, 572 (Tenn. Ct. App. 1988) (abridged opinion April 20, 1981); *Weaver v. Smith*, 102 Tenn. 47, 50 S.W. 771 (1899); *Riddle v. Motley*, 69 Tenn. 468 (1878).

Execution was issued by the Chancery Court Clerk on August 30, 1991, and returned September 11, 1991, as follows:

Executed the within Garnishment on the 11<sup>th</sup> day of September, 1991, at 10:50 o'clock \_\_m. by making known the contents thereof to Floratine Product Group, Inc. and delivery to William Byrnes, Pres., a true copy of same.

There being no property found in my County, either real or personal, upon which to levy this EXECUTION, I have heretofore summoned the Garnishee to Answer before the CHANCERY Court of Shelby County, Tennessee on the \_\_\_\_ day of \_\_\_\_\_, 19\_\_ at 10:00 am. Return having been made on the day, date and time hereinabove stated.

/s/ Alton C. Gilles, Jr., Sheriff.

Tr. Ex. 8.

The return by the Sheriff indicates that no real or personal property of the Debtor was found upon which to levy an execution. Upon return of this execution unsatisfied, and there being no bill to subject property timely filed, any judgment or execution lien that might have been claimed by Pinnacle simply ceased to exist. The Sheriff's return was made September 11, 1991, some four

years before the filing of the petition in this case.<sup>1</sup> No judgment or execution lien existed at that time. Pinnacle's argument that it is a judicial lien creditor by virtue of its judgment fails.

In the alternative, Pinnacle argues that it is a judicial lien creditor because it holds a garnishment lien upon amounts owed to the Debtor by Floratine under the Licensing Agreement. As recited above, the garnishment was executed on September 11, 1991, by delivery to William Byrnes, president of Floratine. No answer was ever filed by Floratine, and Pinnacle took no steps to obtain either a conditional or final judgment against Floratine as contemplated at Tennessee Code Annotated § 26-2-209.<sup>2</sup>

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<sup>1</sup> An Involuntary Petition under Chapter 7 was filed on behalf of ATS Research, Inc. on September 1, 1995.

<sup>2</sup> Tennessee Code Annotated § 26-2-209 provides as follows:

**Failure to appear or answer.** — The date garnishee's answer is received by the court clerk shall be noted on the docket book in the proper manner, whether or not the answer discloses any property subject to garnishment. If the garnishee fails to appear or answer, a conditional judgment may be entered against him for the plaintiff's debt, upon which a notice shall issue to the garnishee returnable at such time as the court may require, to show cause why judgment final should not be rendered against him. On failure of garnishee to appear and show cause, the

Pinnacle's position is that the mere delivery of the garnishment to Floratine gave rise to a lien in favor of Pinnacle that has continued in existence from September 11, 1991, to the present day. Pinnacle relies upon Tennessee Code Annotated § 26-2-213, which provides:

If upon disclosure made on oath by the debtor it appears that the garnishee is indebted to the defendant, but that the debt is not payable and will not become due until some future time, then such judgment as the plaintiff may recover shall constitute a lien upon the debt until and at the time it becomes due and payable.

TENN. CODE ANN. § 26-2-213 (1980).

Pinnacle's argument fails for a number of reasons. The garnishment procedure is purely statutory. Strict compliance with the applicable statutes is required. Pinnacle's argument fails first because it does not appear that the debtor, ATS, ever made oath that the garnishee, Floratine, was indebted to it, but that the debt would become due at some future time. As discussed more fully below, it does not appear that Floratine was indebted absolutely to ATS at the time the garnishment was served, but that the debt was contingent.

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conditional judgment shall be made final, and execution awarded for the plaintiff's entire debt and costs.

TENN. CODE ANN. § 26-2-209 (1980).

Second, a garnishment only reaches obligations that are due or that are certain, although not presently due. *See Overman v. Overman*, 570 S.W.2d 857, 858 (Tenn. 1978); *Hamilton Nat'l Bank v. Long*, 189 Tenn. 562, 226 S.W.2d 293 (1949); *Gray v. Houch*, 167 Tenn. 396, 68 S.W.2d 117 (1934). A garnishment does not reach obligations that are contingent. *See Overman*, 570 S.W. 2d at 858. Although some amount may have been absolutely due ATS by Floratine at the time the garnishment was served, that debt was subject to the prior levy of the Internal Revenue Service. Obligations would arise after that date only if Floratine actually made sales subject to the Licensing Agreement. With the benefit of hindsight, it is now known that sales were made by Floratine, and additional resulting obligations to ATS were incurred. These facts do not, however, change the result in this case. At the time the garnishment could have attached, there was no debt owed by Floratine to ATS that was not already subject to the IRS levy.

Third, the lien described in section 26-2-213 arises upon entry of a judgment against the garnishee. The statute refers to “such judgment as the plaintiff may recover.” The preceding section, 26-2-212, refers explicitly to “the garnishee against whom judgment has been rendered.” The section next preceding that one, section 26-2-211, provides that “execution of the garnishment judgment may be stayed until the choses in action fall due, and the court may order them collected, or if necessary, sold, as may be deemed just and proper.” It is undisputed that no judgment was ever entered against Floratine as the result of Pinnacle’s garnishment. Thus no lien could have arisen under section 26-2-213.

The Court concludes that Pinnacle is not the holder of a garnishment lien or any other lien with respect to the Debtor's interest in the Licensing Agreement. Therefore, Pinnacle is not a judicial lien creditor, and the Trustee's objection to the asserted secured status of Pinnacle's proof of claim should be sustained.

## **II. THE CLAIM OF GORDON JOHNSON**

### **A. Facts**

Mr. Johnson filed a proof of claim in the amount of \$20,000. Mr. Johnson's asserts that his claim is secured by virtue of his Amended Complaint for Attachment, Chancellor's Fiat, Bond for Attachment, Summons and Writ of Attachment, and two orders of the Chancellor in the case of Gordon Johnson v. ATS Research, Inc., Shelby County Chancery Court, Cause No. 1011132-3 R.D. Mr. Gordon was unable to obtain service of process upon ATS at the time his lawsuit was filed and, therefore, elected to file an amended complaint seeking to obtain in rem jurisdiction over the Debtor's property through a writ of attachment. Mr. Johnson claims that he properly attached the Debtor's interest in the Licensing Agreement prior to the filing of the Debtor's petition, and thus that his interest is superior to the Trustee's.

The parties have stipulated to the following additional facts:

1. The Writ of Attachment issued by the Chancery Court Clerk was served by a private process server and not by the Sheriff of Shelby County;

2. No levy was made of the Writ of Attachment by the Sheriff of Shelby County;
3. No funds were ever paid into court by Floratine Products Group prior to the bankruptcy;
4. No execution of levy was made on the Writ of Attachment or In Rem Judgment after the entry of the final judgment.

In the Chancery suit, an “Order to Require Floratine Products Group to Pay Funds into Court” was entered December 11, 1992. That order provides in pertinent part:

IT IS THEREFORE, ORDERED, ADJUDGED AND DECREED that Floratine Products Group be and is hereby ordered to pay into this Court all sums due ATS Research, Inc., up to the total sum of \$20,000.00, after satisfaction of the outstanding IRS lien or attachment that has been filed against ATS Research, Inc., and that all sums paid into this Court shall be held pending its further orders.

Tr. Ex. 16.

Thereafter, Mr. Johnson obtained an “Order for Default Judgment and Damages” in the amount of \$20,000.00, entered July 10, 1995, which provides in pertinent part:

That Floratine Products Group, Inc. be and is hereby ordered to pay into court, after payment of the IRS lien, all funds due it from ATS Research, Inc., up to and including the judgment and costs.

Tr. Ex. 12.

## **B. Analysis**

It is well settled that a levy on property is necessary to confer jurisdiction under a writ of attachment. *See Cooper v. Reynolds*, 77 U.S. 308, 317 (1870); *see also* TENN. CODE ANN. §§ 29-6-107(b) (1980); 29-6-133 (1980). While Tennessee law permits prejudgment attachment of a debt not yet due, *see* TENN. CODE ANN. § 29-6-102 (1980), no final judgment may be rendered upon such attachment until the debt becomes due, *see* TENN. CODE ANN. § 29-6-104 (1980). In order to constitute a valid levy, whether in the case of an attachment or an execution, the property levied upon must be present and within the control of the officer at the time of making the levy. *See Connell v. Scott*, 64 Tenn. 595, 597 (1975). Tennessee Code Annotated § 29-6-120 states:

**Contents of writ.** — The writ shall be addressed to the sheriff of the county, unless the suit be before a judge of the court of general sessions, and then it may be addressed to a constable; and it shall command him to attach and safely keep, repleviable upon security, the estate of the defendant, wherever the same may be found in the county, or in the hands of any person indebted to or having any of the effects of the defendant, or so much thereof as shall be of value sufficient to satisfy the debt or demand, and the costs of the complaint.

TENN. CODE ANN. § 29-6-120 (1980). According to the Court of Appeals of Tennessee, in its unpublished decision *Piper Industries, Inc. v. American Compactors, Inc.*, 1993 WL 273889 (Tenn. Ct. App. July 22, 1993),<sup>3</sup> “the clear legislative intent is that a writ of attachment must be served by a

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<sup>3</sup> In the *Piper Industries* case, a writ of attachment was also served by a private process server. 1993 WL 273889, at \*1 (Tenn. Ct. App. July 22, 1993). In an action to determine the priority of two creditors as to their entitlement to certain funds in a bank account, the trial court concluded that the writ of garnishment served by the sheriff was superior to the writ of attachment improperly served by the private process server. *Id.* at \*2. The court of appeals affirmed the trial court’s decision. *Id.* at \*3.

sheriff or other lawful officer.” *Id.* at \*3. *See also Riner v. Stacy*, 27 Tenn. 288 (1847) (concluding that the owner of an execution cannot himself levy on property). Also, where property subject to attachment is pledged to another, a creditor may not attach such property without discharging the outstanding debt owed to the pledgee. *See First National Bank of Memphis v. J.T. Pettit & Co.*, 56 Tenn. 447, 451 (1872).

The writ of attachment in Mr. Johnson’s state court case was served by a private process server; therefore, no levy on the writ of attachment was made, and no property of the Debtor or Floratine was taken into custody, constructive or otherwise, by the Sheriff. Moreover, even if service by a private process server could constitute a levy, it is clear that any funds owed by Floratine at the time of the writ of attachment were already subject to the prior levy and lien of the IRS. Therefore, it was not possible for Mr. Johnson to levy on any funds owed by Floratine to the Debtor, which were subject to the IRS’s lien and levy without discharging the IRS’s lien. Accordingly, to the extent the Chancery Court entered a final in rem judgment, it could only have been enforceable against debts which were already due to the Debtor and subject to any lawfully levied attachment. Since, however, there was no levy by the Sheriff, no property owed to the Debtor was ever lawfully attached which could have formed the basis of an in rem judgment.

In *In re Hockaday*, 169 B.R. 640 (Bankr. M.D. Tenn. 1994), a creditor asserted it was secured by reason of an attempted prepetition levy on property of the debtor. The court found that the trustee’s status as a hypothetical judgment lien creditor under 11 U.S.C. § 544(a) superseded the

judgment creditor's claim of lien due to defects in the creditor's prepetition levy. In finding in favor of the trustee, Judge Lundin stated:

Under Tennessee law a money judgment can be enforced through a writ of execution. Tenn. Code Ann. § 26-1-103. An execution is enforceable by a levy upon property of the judgment debtor. The sheriff or other officer to whom an execution is issued has thirty (30) days to perform the levy and return the writ. Tenn. Code Ann. § 26-1-401 (Supp. 1993). Tennessee case law considering the requirements for a valid levy is uniformly ancient and frequently unusual.

The trustee argues that the sheriff failed to exercise sufficient control over the judgment debtor's property to effect a valid levy. It is unnecessary to reach that question because the sheriff's return of execution is deficient on its face.

Tennessee law plainly requires that "[a] description of the property levied on, with the date of levy, shall be endorsed upon and appended to the execution." Tenn. Code Ann. § 26-3-108. . . .

The statute makes no distinction between levies on realty and personalty. The policies that underlie the description requirement apply with equal force to personal property. . . .

The absence of any property description on the sheriff's return of Municipal's levy renders the levy void.

169 B.R. at 642-43 (citations omitted).

In the present case, the writ of attachment was served by a private process server, and no levy was made by the Sheriff. Accordingly, because there was no levy and because all sums which were due and payable were already subject to the lien and levy of the IRS, Mr. Johnson cannot assert a lien either by reason of the attachment or subsequent judgment.

### III. CONCLUSION

Based on the foregoing analysis, this Court sustains the Trustee's objection to the claims of Pinnacle Press, Inc. and Gordon Johnson. The Court concludes that neither Pinnacle's nor Mr. Johnson's claims are secured. Rather, both claims should be classified as general, unsecured claims. The Court will cause a separate order to be entered consistent with this opinion.

BY THE COURT

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JENNIE D. LATTA  
United States Bankruptcy Judge

Date: August 14, 1998

cc: Michael P. Coury  
Attorney for Chapter 7 Trustee  
50 N. Front Street, Suite 1300  
Memphis, TN 38103

Norman P. Hagemeyer  
Chapter 7 Trustee  
5119 Summer Avenue, Suite 411  
Memphis, TN 38122

Irma W. Merrill  
Attorney for Pinnacle Press, Inc.  
50 N. Front Street, Suite 1075  
Memphis, TN 38103

Ronald L. Coleman  
Attorney for Gordon Johnson  
3408 Democrat Road  
Memphis, TN 38118