

IN THE UNITED STATE BANKRUPTCY COURT  
FOR THE MIDDLE DISTRICT OF TENNESSEE

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IN RE:

PERPETUAL CORPORATION,  
d/b/a BOOKER FUNERAL HOME,  
d/b/a RESTLAWN MEMORIAL  
GARDENS, and d/b/a GLASGOW  
MEMORIAL GARDENS,

BK #388-081215-WHB  
Chapter 7

Debtor.

JOHN C. McLEMORE,  
TRUSTEE,

Plaintiff,

v.

Adversary Proceeding  
No. 389-0362

EVJ, INC., BOOKER FUNERAL  
HOME, INC. and TRANSAMERICA  
FLEET LEASING,

Defendants.

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MEMORANDUM OPINION AND  
ORDER ON TRUSTEE'S COMPLAINT  
TO AVOID LIENS

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At issue in this core, adversary proceeding<sup>1</sup> is whether six caskets and a 1979 funeral coach are property of the estate which the trustee may sell for the benefit of creditors or whether these items were sold to the defendant, EVJ, Inc. (hereinafter "EVJ") in the debtor's prior Chapter 11 proceeding. Resolution of this issue calls for determination of whether, based upon the record: (1) the debtor and EVJ intended and effectuated conveyance of these items to EVJ regardless of whether EVJ held security interests on them, and if not; (2) whether the debtor and EVJ intended and in fact effectuated only a sale of the items in which EVJ held a security interest, and if so; (3) whether EVJ held a properly perfected security interest, superior to the

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<sup>1</sup> See, 28 U.S.C. §157(b)(2)(K) and (O) and Bankruptcy Rule 7001(2).

trustee's status as a lien creditor, in the items at issue so that they were subject to the sale; and (4) whether EVJ is entitled to recover \$6,787.23 paid for 1988 City and County taxes on the real property conveyed by the debtor purportedly free and clear of any such claims. The following constitutes findings of fact and conclusions of law pursuant to Bankruptcy Rule 7052.

The parties have stipulated that these issues may be resolved from the Court's record of this case. This record reflects that the debtor's case was originally filed as a voluntary Chapter 11 petition on December 8, 1988. On July 10, 1989, the case was voluntarily converted to one under Chapter 7 of the Bankruptcy Code and the case trustee was subsequently appointed<sup>2</sup>. The sale at issue was consummated prior to the conversion.

It is the trustee's position in this dispute that the sale was intended to accomplish and did, in fact, accomplish transfer to EVJ of only the debtor's assets in which EVJ held a properly perfected security interest. Further, the trustee asserts that the items at issue here were not subject to such a security interest and thus were not intended to be nor were transferred. On the other hand, EVJ contends that the parties intended and, in fact, effectuated a transfer of these items regardless of the status of its security interest. Moreover, according to EVJ, it held valid perfected security interests in the items at issue. As such, even if the intent were to transfer only its collateral, these items were subject to its security interest.

The Court first turns to consideration of whether the parties intended and effectuated a sale of the items at issue regardless of EVJ's secured status.

From the inception of the debtor's Chapter 11 case, motions for relief from the stay, for dismissal of the case, for adequate protection and for orders prohibiting the use of cash collateral were filed against the debtor by EVJ and another of the debtor's secured creditors, Sovran Bank/Chattanooga. According to those motions, EVJ and Sovran held security interests in "virtually all the debtor's assets." These motions were subsequently resolved with the entry of a "Stipulation and Agreed Order Regarding Relief from the Stay,

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<sup>2</sup> The Court is aware that §348(a) has the effect of retaining the original Chapter 11 filing date and order for relief.

Adequate Protection and Use of Cash Collateral" (hereinafter "stipulation") executed by the debtor, Sovran, and EVJ and entered by the Court on June 6, 1989.

The stipulation essentially provides in pertinent part that the parties thereto agree that: (1) the aggregate amount of indebtedness owed to EVJ and Sovran as of the date of the petition was \$829,815.98; (2) EVJ holds a "valid and properly perfected lien upon and security interest in virtually all of the debtor's assets, specifically those described in EVJ's proof of claim filed . . . on February 15, 1989 and all trust fund deposits . . .," and Sovran holds a first priority security interest in the real and personal property of Booker Funeral Home; (3) as adequate protection of EVJ's interest in any cash collateral, EVJ is granted a lien of \$39,135.53 on accounts receivable and their proceeds arising on or after the petition date; (4) upon the stipulation becoming final, EVJ shall be granted relief from the stay and shall be immediately entitled to possession of "the collateral" free and clear of liens or claims except those of Sovran which shall continue to be binding on EVJ; (5) upon the lifting of the automatic stay, the debtor "shall execute" the documents necessary to effectuate a "turnover of the collateral" including a deed in lieu of foreclosure and a bill of sale.

According to paragraph 7 of the stipulation, in exchange for the transfer of the collateral to EVJ, EVJ was to release any and all claims against the debtor and the debtor's estate upon certification by the debtor that all trust fund deposits required by law except for those specified had been made by the debtor. In addition, EVJ agreed to release the debtor and its principal, Mr. Claiborne Kinnard, for any deficiency between the sums owed and the value of the collateral. Provision was made in the stipulation and notice thereof for the filing of objections thereto by any interested party. None were filed and in accordance with its terms, the order became final upon expiration of the time limit for filing objections.

On June 22, 1989, the debtor-in-possession filed a "Notice of Intent to Sell Real and Personal Property at Private Sale." This notice provides that the property described on Exhibit A attached to the Notice is to be sold to EVJ and that EVJ holds a valid and perfected lien upon "the property." The notice further provides that the property is to be sold free and clear of all liens except " . . . city and county taxes for 1989; outstanding interment rights; and an . . . existing deed of trust in favor of Sovran Bank/Chattanooga." Among

the items listed on "Exhibit A" to the notice are a "1979 Cadillac Funeral Coach" and "All caskets on floor at time of closing," said assets being designated as being located at the Booker Funeral Home.

On June 28, 1989, an order was entered which gave the debtor the right to possession and ordered the debtor to "immediately transfer and convey the collateral to EVJ free and clear of any and all liens, claims and encumbrances of any nature whatsoever, . . . except the lien of Sovran Bank . . ." This order described the June 6, 1989 stipulation as an order which granted EVJ and Booker relief from the stay and required the debtor to convey to those parties "all assets . . . in which EVJ and Booker claim a security interest." (Emphasis added.) The June 28, 1989 order further described the notice of intent to sell as having given notice that the debtor intended to sell "virtually all of the property of the estate at private sale to EVJ. . . "

In accordance with these orders, the debtor's president executed quit claim deeds and a "Bill of Sale" in favor of EVJ to consummate the transfer, copies of which are included in the court's file, albeit attached to the debtor's response to EVJ's motion to hold the debtor in contempt for failing to transfer the items at issue. The Bill of Sale is pertinent to this proceeding because the provisions of the document which provide for the conveyance of "caskets and funeral vaults" as well as "motor vehicles" were stricken by the debtor's president as evidenced by his initials. Moreover, the debtor subsequently failed to deliver the six caskets and 1979 funeral coach to EVJ.

From these facts, the Court could engage in a distinction between the apparent intent of the parties, as evidenced by the "Notice of Intent to Sell. . .," to include these items in the sale, and the actual intent of the debtor, as evidenced by the altered Bill of Sale and the debtor's refusal to deliver, to exclude these items as not subject to EVJ's security interest. Thus, the question would become whether EVJ held a valid security interest in these items.

However, the Court is persuaded that the decisive issue here is not whether EVJ held a valid security interest in the items but rather, what the parties actually bargained for as evidenced by the "stipulation," "notice of intent to sell," and order approving the sale.

As discussed above, the stipulation reflects that EVJ gave up substantial rights in agreeing to the conveyance of the debtor's assets in satisfaction of its claim. Moreover, the notice of intent to sell clearly includes the 1979 funeral coach and "all caskets on the floor at closing." This notice was prepared by the debtor's counsel and served on interested parties with an opportunity for objections to be filed. None were filed. From this, the Court concludes that the parties bargained for, agreed to, and intended that these items be included among the assets sold to EVJ, regardless of the status of EVJ's security interests. The deletion of these items from the bill of sale by the debtor-in-possession's president, after the agreement was reached and approved by the Court does not work to dissuade the Court from its conclusion.

Moreover, the Court concludes that the parties agreed to the transfer of "all caskets on the floor at closing" to EVJ notwithstanding an order entered on June 23, 1989, which authorized the debtor to purchase additional caskets at the request of EVJ and Omega Management Service, Inc. This order was entered on June 23, 1989, one day after the "Notice of Intent to Sell. . ." was filed and six days before the order approving the sale was entered, and it authorizes Omega, the potential purchaser of Booker Funeral Home from EVJ, to purchase additional caskets for the debtor and to receive the proceeds from the sale of same. Thus, it may be that the six caskets at issue are rightfully collateral for a postpetition claim of Omega. However, that issue is not before the Court and for purposes of this proceeding, the Court holds that the six caskets were to be conveyed to EVJ pursuant to the "stipulation" and "notice of intent to sell."

The Court is aware that the Chapter 7 trustee could become a lien creditor under §544; however, this trustee is precluded from attacking the Chapter 11 postpetition transfers because they were authorized by the Court. 11 U.S.C. §549(a)(2)(B).

Finally, before the Court is the issue of whether EVJ is entitled to recover \$6,787.23 paid for 1988 property taxes on the real property transferred to EVJ in lieu of foreclosure. As discussed above, the property was to be conveyed free and clear of any liens or encumbrances except 1989 property taxes, Sovran Bank's interest and certain trust fund obligations pursuant to the terms of the June 6, 1989 stipulation. As such, had EVJ not paid the 1988 taxes, the Chapter 11 debtor-in-possession would have been required to do so.

Consequently, EVJ's payment of the taxes resulted in preservation of the estate and the Court is of the opinion that EVJ is entitled to an administrative expense claim pursuant to 11 U.S.C. §503(b) for the 1988 tax payments. This is not to say that EVJ is entitled to a judgment against the trustee or the estate for this amount, but certainly EVJ is entitled to amend its proof of claim to file an administrative expense claim for this amount. The Court does not know if there are sufficient funds to pay all administrative claims.

From the foregoing, the case record, and the totality of circumstances, it is **HEREBY ORDERED** that:

1. The six caskets and the 1979 funeral coach are not property of the estate, having been conveyed to EVJ during the debtor's prior Chapter 11 case pursuant to stipulation, notice and Court authorization and the trustee's complaint to avoid lien as to these items is **DENIED**;

2. The payment of the 1988 property taxes entitles the defendant EVJ to file an administrative expense claim against the estate in the amount of \$6,787.23.

SO ORDERED this 3<sup>rd</sup> day of April, 1990.

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WILLIAM HOUSTON BROWN  
UNITED STATES BANKRUPTCY JUDGE  
BY DESIGNATION

cc:

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