

IN THE UNITED STATES BANKRUPTCY COURT  
FOR THE WESTERN DISTRICT OF TENNESSEE  
WESTERN DIVISION

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IN RE:

GLOBAL AIRCRAFT PARTS, LTD.,  
  
Debtor.

BK #90-25400-WHB  
Chapter 7 (asset)

GEORGE W. EMERSON, JR.,  
Interim Chapter 7 Trustee,  
  
Plaintiff,

v.

Adversary Proceeding  
No. 90-0256

FEDERAL EXPRESS CORPORATION,  
  
Defendant.

and

WASHINGTON SQUARE CAPITAL, INC.,  
  
Intervenor/Cross Plaintiff/  
Counter Plaintiff

v.

FEDERAL EXPRESS CORPORATION,  
  
Cross Defendant

and

GEORGE W. EMERSON, JR.,  
Interim Chapter 7 Trustee,  
  
Counter Defendant.

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**MEMORANDUM OPINION AND ORDER ON  
CROSS MOTIONS FOR PARTIAL SUMMARY JUDGMENT**

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This cause is before the Court on cross motions for partial summary judgment filed by the Trustee and Federal Express Corporation. At issue is whether Federal Express is entitled to assert a lien upon goods stored on behalf of the debtor and if so, whether such lien may be avoided by the Trustee pursuant to 11 U.S.C. §545 and/or §547. The issues presented are core pursuant to 28 U.S.C. §157(b)(2)(A), (B), (F) and (K). The following constitutes findings of fact and conclusions of law in accordance with F.R.B.P. 7052 and 7056.

#### FACTUAL SUMMARY

The plaintiff in this proceeding is George W. Emerson, Jr., the duly appointed Chapter 7 Interim Trustee ("Trustee"). The defendant is Federal Express Corporation ("Federal Express"), a Delaware corporation registered and qualified to transact business, including warehousing and distribution activities, in Tennessee. Global Aircraft Parts, Ltd., the debtor, is a limited partnership formerly in the business of selling aircraft parts. Washington Square Capital, Inc. ("Washington") is a secured creditor of the debtor pursuant to a promissory note and loan and security agreement dated May 11, 1989. By virtue of the loan agreement, the debtor granted Washington a security interest in all of its inventory, equipment, fixtures, accounts and certain other property which Washington assertedly perfected by filing a UCC-1 financing statement. Washington asserts a perfected security interest in the inventory and its proceeds which are the subject of this proceeding. Federal Express contends that it holds a perfected statutory lien on the inventory which is superior to the claims of the Trustee and of Washington. However, neither motion under consideration here is designed to dispose of Washington's claims, thus, the validity, extent and priority of Washington's interest in the inventory or proceeds, is not at issue nor will be resolved in this opinion.

The record reflects that an involuntary Chapter 7 petition was filed against this debtor on June 25, 1990. (Motion of . . . Trustee for . . . Summary Judgment, p. 2; Memorandum of Federal Express . . . pp. 4 & 5) On July 6, 1990, George W. Emerson, Jr. was appointed interim trustee. (Id.) An order for relief under Chapter 7 was entered on July 27, 1990. (Memorandum of Federal Express . . . p. 5)

On July 26, 1990, Federal Express filed a proof of claim against the debtor's estate in the amount of \$482,539.10. Of the total claim, Federal Express asserts that \$257,400.00 is a secured claim for warehouse storage and handling fees and expenses incurred in preparing the stored goods for sale. (Motion of . . . Trustee . . . p. 2, Memorandum of Federal Express . . . p. 5)

Prior to the date the involuntary petition was filed, Federal Express stored a portion of the debtor's inventory, consisting of aircraft parts and supplies, in a warehouse at 4985 Outland Center Drive in Memphis pursuant to a Distribution Agreement entered into with the debtor on February 22, 1989. (Motion of . . . Trustee . . . p. 3; Ex. E, Memorandum of Federal Express . . . p. 2; Exhibit A to Affidavit of James R. Mulroy)

According to Federal Express, upon receipt of the debtor's goods for storage, Federal Express issued receiving documents to evidence the receipt. (Memorandum of Federal Express . . . p. 2) As the agreement's title indicates, Federal Express also served to distribute the inventory upon receipt of written requests for shipment from the debtor. (Id.) This relationship continued until approximately May 11, 1990, when, as a result of the debtor's failure to pay warehouse and transportation charges, Federal Express refused to ship inventory of the debtor or to allow the debtor's employees access to the warehouse or inventory. (Motion of . . . Trustee . . . p. 4; Memorandum of Federal Express . . . pp. 2-3)

Meanwhile, the debtor had also defaulted on its promissory note executed in favor of Washington. Consequently, on May 29, 1990, Washington filed a complaint against Federal Express and the debtor in the Chancery Court of Shelby County, Tennessee wherein Washington requested "a hearing to determine [inter alia] the rights of the parties herein as to the right of possession" of the goods stored by Federal Express. (Trustee's complaint, Ex. A).

At the time Washington's complaint was filed, Federal Express was in possession of the disputed goods. Thus, Federal Express moved to dismiss Washington's complaint on the grounds that Federal Express possessed a warehouseman's and carrier's lien on the goods, superior to that of Washington, pursuant to Tennessee Code Annotated ("Tenn. Code Ann.") §47-7-209 and §47-7-307. Shortly after the Chancery Court complaint was filed, Washington located a buyer for the goods. (Memorandum of Federal Express . . . , p. 3)

Consequently, the Chancery Court action was partially resolved with the entry of a consent order between Federal Express and Washington on June 5, 1990. (Motion of . . . Trustee . . . , p. 4; Memorandum of Federal Express . . . pp. 3-4). In pertinent part, the Consent Order provides:

2. In order to resolve this conflict and in order to mitigate the amount of damages which Washington may incur, Washington should have possession of the goods in order that it may proceed to foreclose its security interest against Global Aircraft Parts, Ltd. ("Global") and the Federal Goods and, to the extent applicable, Washington's sale will foreclose the lien asserted by Federal pursuant to T.C.A. §47-7-209 and §47-7-307 [warehouseman's and carrier's lien].

3. This voluntary surrender of possession of the Federal Goods by Federal to Washington, subject to the jurisdiction and orders of this Court, shall not prejudice in any way Federal's right to assert any lien it may have pursuant to T.C.A. §47-7-209 and §47-7-307 or any other claim of right.

4. The warehouse charges assessed by Federal on the Federal Goods shall terminate as of the close of business June 4, 1990.

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED THAT:

1. The Federal Goods (as defined in the amended complaint) shall be delivered immediately to Washington.

2. An inventory of such goods shall be taken by Federal Express and Washington, jointly, so as to determine the property against which Federal asserts its lien and which shall be delivered by Federal to Washington pursuant to this Court Order.

3. Washington shall post a bond in the amount of \$200,000.00 with good and sufficient sureties, approved by this Court, which bond shall stand in lieu of the Federal Goods and such bond shall be conditioned to pay any damages which may arise from this Court directing that possession of the Federal Goods be given to Washington if such damages shall be adjudged by this Court.

4. The warehouse charges assessed by Federal on the Federal Goods shall terminate as of the close of business June 4, 1990.

The debtor was not a party to this consent order. (Motion of . . . Trustee . . . , p. 4)

As noted above, following the entry of this order in the Chancery Court proceeding, an involuntary petition was filed against the debtor on June 25, 1990. On July 5, 1990, Mr. Emerson was appointed interim trustee and an order for relief was entered on July 27, 1990.

From these facts, which are largely undisputed, both the Trustee and Federal Express assert entitlement to summary judgment on the issue of whether the claim of Federal Express to the inventory is a secured claim superior to that of the Trustee. It is the Trustee's position that Federal Express is not entitled to a summary judgment because there is insufficient evidence that it issued warehouse receipts or bills of lading which comply with and are required by applicable nonbankruptcy law for the establishment of a warehouseman's or carrier's lien. Moreover, according to the Trustee, Federal Express, by virtue of the Chancery Court consent order, voluntarily relinquished possession of the inventory and thus, any lien it may have been entitled to assert against the Trustee. In the alternative, the Trustee contends that should the Court find, notwithstanding the above arguments, that Federal Express holds a valid lien or liens, such liens are subject to avoidance by the Trustee pursuant to 11 U.S.C. §545 and §547.

Federal Express counters the Trustee's allegations by asserting that it in fact issued requisite warehouse receipts and bills of lading for the goods stored and shipped for the debtor. As support for this allegation, Federal Express has submitted the affidavit of James R. Mulroy<sup>1</sup> (see ¶5 of affidavit), with an "example" of the receipts so issued being Exhibit B to his affidavit. Accordingly, Federal Express maintains that its asserted liens are properly perfected. Federal Express further contends that these liens are preserved by the language of the Chancery Court consent order and that they are not subject to avoidance by the Trustee. Each party seeks partial summary judgment.

#### SUMMARY JUDGMENT

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<sup>1</sup> Mr. Mulroy is a Senior Attorney in the litigation section of the legal department of Federal Express Corporation.

General standards for the issuance of summary judgment in the bankruptcy context are found at F.R.B.P. 7056(c) which provides:

The judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with affidavits, if any, show that there is no genuine issue of material fact and that the moving party is entitled to a judgment as a matter of law.

This rule has recently been interpreted as establishing a standard that "provides that the mere existence of some alleged factual dispute between the parties will not defeat an otherwise properly supported motion for summary judgment; the requirement is that there be no genuine issue of material fact." In re Suburban Motor Freight, Inc., 124 B.R. 984, 992 (Bankr. S.D. Ohio 1990), quoting Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 106 S. Ct. 2505, 2511, 91 L. Ed. 2d 202 (1986) (Emphasis in original) Therefore, insubstantial issues of fact or the "hint" of a genuine issue of material fact will not preclude summary judgment. In re Suburban Motor Freight, Inc., 124 B.R. at 992. The question of what issues of fact are material is to be resolved by the "substantive law governing the case." Id., at 993, citing Street v. J.C. Bradford & Co., 886 F. 2d 1472, 1479-80 (6th Cir. 1989).

#### DISCUSSION AND CONCLUSIONS

From these directives, the question becomes whether there are issues of fact that are material under applicable substantive law. The applicable substantive law for purposes of this proceeding is state statutory lien law for it is well settled that determination of the validity of a statutory lien and its enforceability against one in the position of a bankruptcy trustee is made by reference to the law of the state which created the lien. See, e.g., In re Loretto Winery, Ltd., 898 F. 2d 715 (9th Cir. 1990); In re Scott, 88 B.R. 196 (Bankr. E.D. Ark. 1988).

The Tennessee statutory lien law regarding warehouseman and carrier liens is found at Tenn. Code Ann. §47-7-209 and §476-7-307. In pertinent part, these statutes provide:

**47-7-209 Lien of warehouseman -**

(1) A warehouseman has a lien against the bailor on the goods covered by a warehouse receipt or on the proceeds thereof in his possession for charges

for storage or transportation . . . , insurance, labor, or charges present or future in relation to the goods, and for expenses necessary for preservation of the goods or reasonably incurred in their sale pursuant to law . . .

(4) A warehouseman loses his lien on any goods which he voluntarily delivers or which he unjustifiably refuses to deliver.

**47-7-307 Lien of Carrier -**

(1) A carrier has a lien on the goods covered by a bill of lading for charges subsequent to the date of its receipt of the goods for storage or transportation . . . and for expenses necessary for preservation of the goods incident to their transportation or reasonably incurred in their sale pursuant to law. But against a purchaser for value of a negotiable bill of lading, a carrier's lien is limited to charges stated in the bill or the applicable tariffs, or if no charges are stated, then to a reasonable charge . . .

(3) A carrier loses his lien on any goods which he voluntarily delivers or which he unjustifiably refuses to deliver.

From this language, it is evident that the creation of such liens is initially dependent on the issuance of warehouse receipts and bills of lading. Such warehouse receipts "need not be in any particular form." Tenn. Code Ann. §47-7-202(1). However, the warehouseman will be liable for damages if any are caused by his omission of any of the following information:

- (a) the location of the warehouse where the goods are stored;
- (b) the date of issue of the receipt;
- (c) the consecutive number of the receipt;
- (d) a statement whether the goods received will be delivered to the bearer, to a specified person, or to a specified person or his order;
- (e) the rate of storage and handling charges, except that where goods are stored under a field warehousing arrangement a statement of that fact is sufficient on a nonnegotiable receipt;
- (f) a description of the goods or the packages containing them;
- (g) the signature of the warehouseman, which may be made by his authorized agent;
- (h) if the receipt is issued for goods of which the warehouseman is owner, either solely or jointly or in common with others, the fact of such ownership; and
- (i) a statement of the amount of advances made and of liabilities incurred for which the warehouseman claims a lien or security interest . . . If the precise amount of such advances made or of such liabilities incurred is at the time of the issue of the receipt unknown to the warehouse man or his agent who issues it, a statement of the fact that advances have been made or liabilities incurred and the purposes thereof is sufficient.

Tenn. Code Ann. §47-7-202(2).

Bills of lading are defined as documents of title which evidence "the receipt of goods for shipment issued by a person engaged in the business of transporting or forwarding goods and include an airbill." Tenn. Code Ann. §47-1-201(6), (15).

As discussed above, Federal Express contends that "[u]pon receipt of Debtor's products and parts for storage, Federal Express issued receiving documents to serve as a verification of receipt of such items." (Memorandum of Federal Express . . . , p. 2) This statement is echoed by paragraph 5 of Mr. Mulroy's affidavit and is supported by "Exhibit B" to the affidavit which is "[a] copy of an example of said Receiving Documents . . . ." "Exhibit B" is styled "Receiving Document" and appears to contain the information required by Tenn. Code Ann. §47-7-202(2) except perhaps the amount for which the warehouseman claims a lien. However, such an omission is not necessarily fatal to the effectiveness of the document as a warehouse receipt; rather, it simply means that the carrier may be liable for any damages incurred by another due to the omission. Tenn. Code Ann. §47-7-202(2).

As to other particulars, the Receiving Document assigns numbers to parts and codes to locations. Therefore, although the document appears to sufficiently constitute a warehouse receipt within the meaning of applicable law, explanation of the particulars is necessary to conclusively establish that it is a sufficient warehouse receipt. However, even if such an explanation were not necessary to establish the document as a warehouse receipt, it is clear that the exemplar document does not cover all the goods and parts on which Federal Express claims a lien. Indeed, Federal Express offers the document as only an "example" of the receiving documents issued for the debtor's goods.

It has been established that under applicable law, a warehouseman or carrier can only assert a lien upon goods covered by a warehouse receipt or bill of lading. Thus, the existence and sufficiency of warehouse receipts or bills of lading are material facts necessary for the creation of a warehouseman's or carrier's lien. Although the "example" submitted by Federal Express strongly indicates the existence and sufficiency of warehouse receipts, the Court is hesitant to conclude that such has been unequivocally

established. Just as the Court cannot assume that the documents exist or are sufficient, the Court cannot assume that they do not exist or are insufficient. Therefore, the existence and sufficiency of the warehouse receipts and bills of lading for all goods on which Federal Express claims a lien present a genuine issue of material fact which renders the dispute at hand ineligible for summary judgment.

In order to resolve the remaining issues presented, i.e., whether Federal Express forfeited its lien and if not, whether the lien is avoidable by the Trustee, it must first be established that a warehouseman's and/or carrier's lien in favor of Federal Express was in fact created. Consequently, the Court is compelled to deny both parties' motions for partial summary judgment without prejudice to the parties' rights to renew their motions and to submit additional evidence regarding the existence and sufficiency of the warehouse receipts and bills of lading.

From the above, it is **HEREBY ORDERED** that the motion of the Trustee for partial summary judgment and the motion of Federal Express for partial summary judgment are denied.

A status conference is set for 9:30 a.m. on July 1, 1991, in Courtroom 680, 200 Jefferson Avenue, Memphis, Tennessee, for the purpose of determining whether further motions will be filed and otherwise scheduling the disposition of this adversary proceeding.

SO ORDERED THIS 10<sup>th</sup> day of June, 1991.

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WILLIAM HOUSTON BROWN  
UNITED STATES BANKRUPTCY JUDGE

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