

**UNITED STATES BANKRUPTCY COURT
WESTERN DISTRICT OF TENNESSEE**

IN RE:

DONNIE SOWELL,
Debtor.

Chapter 13
Bankruptcy No. 95-24907-WHB

DONNIE SOWELL,

Plaintiff

VS.

Adversary Proceeding No.
96-0070

PINES TRAILER LIMITED PARTNERSHIP,
D/B/A BLUE FINANCIAL LIMITED PARTNERSHIP,
and JOHN DEERE EMPLOYEES CREDIT UNION,

Defendants.

**MEMORANDUM OPINION AND ORDER ON AMENDED COMPLAINT
TO DETERMINE VALIDITY, EXTENT AND PRIORITY OF LIENS**

The debtor filed this adversary proceeding , which has been amended, and the Court will allow the debtor's motion to amend and will deny the objection of Pines Trailer Limited Partnership ("Pines") to the amendment. The debtor objected to the appearance of counsel for Pines because of that counsel's failure to comply with Local Bankruptcy Rule 2090-1(b), but the Court will deny the debtor's objection based upon Pines' counsel's agreement to promptly comply with that Rule by the filing of a motion and proposed order to appear in this Court *Pro Hac Vice*.

At a pretrial conference on March 19, 1996, counsel for the parties agreed that the issue in this adversary proceeding did not involve any disputed issues of fact and that the proceeding was ripe for decision by the Court on the issue of law presented. Thus, this opinion contains conclusions of law pursuant to FED. R. BANKR. P. 7052.

The undisputed facts underlying this proceeding are that the debtor entered into two agreements with Pines in November, 1993, wherein the debtor purchased two trailers from Pines, with Pines retaining security interests in the trailers. In 1995, the debtor borrowed money from the other defendant, John Deere Employees Credit Union (“John Deere”), and pledged the same two trailers to John Deere, which was to hold liens junior to Pines’ liens. Prior to the filing of this chapter 13 case, the debtor defaulted monetarily on his obligations to Pines.

One of the trailers was stolen prepetition, and the insurance proceeds for that loss were turned over in open Court on March 19 to the chapter 13 trustee, who will negotiate the insurance draft and pay the proceeds to Pines, thus satisfying one of Pines’ secured claims. Pines may have an unsecured claim for any deficiency remaining on that debt. Of course, as to the stolen trailer, John Deere has no secured claim remaining.

As to the remaining trailer, the debtor’s confirmed plan provides for payment of the Pines’ secured claim at the \$15,000 value of the trailer, at 10% interest and with a \$388 monthly payment. Pines has an unsecured claim for the unsecured portion of that debt. Notwithstanding its secondary lien, John Deere is not relying upon that lien for security in the debtor’s plan. Rather, John Deere has a co-maker on this particular debt, and the plan provides for John Deere’s claim of \$7,641.27 to be paid in full because of the co-maker status of the debt. 11 U.S.C. § 1322(b)(1). By its answer filed in this adversary proceeding, John Deere admits that “the trailers provided no security for the Credit Union’s claim in the Plan.”

From these admitted facts, it would appear that there is no controversy for determination. However, Pines takes the position that this Court must avoid the purported secondary lien of John Deere in the remaining trailer because the giving of that lien was in violation of the terms of the

security interest and agreement between the debtor and Pines. A copy of the security agreement is attached as an exhibit to Pines' objection to the debtor's plan, and it is correct that section B of that agreement prohibits the debtor from further encumbering the collateral without Pines' prior consent. And, it is undisputed that the debtor violated this contractual term by granting John Deere a secondary lien. The debtor's act was a prebankruptcy default in addition to his prebankruptcy monetary default.

Pines asks the Court to go further than it is necessary for the Court to go. Pines wants John Deere's lien avoided because it was given in violation of contractual terms between the debtor and Pines. However, UCC § 9-311 recognizes that a "debtor's rights in collateral may be voluntarily or involuntarily transferred," including by the creation of a security interest, "notwithstanding a provision in the security agreement prohibiting any transfer or making the transfer constitute a default." Thus, even though this debtor's grant of a lien to John Deere constituted a prepetition default, it is not clear that it was a voidable act.

Moreover, it is unnecessary for the Court to decide whether John Deere's secondary lien is voidable as a violation of the prior security interest in favor of Pines, because John Deere's lien is avoided under the Bankruptcy Code. Section 506(a) of the Code provides that a claim is secured only "to the extent of the value of such creditor's interest in the estate's interest in such property." This value is "determined in light of the purpose of the valuation and of the proposed disposition or use of such property." 11 U.S.C. § 506(a). Here, the debtor and John Deere agree that the value of the remaining trailer is less than the amount of Pines' first lien. As a result, for purposes of this chapter 13 plan, which has been confirmed and is final as to John Deere, John Deere is an unsecured creditor. John Deere admits that in its answer, saying that it is looking only to its status as the holder

of a co-maker loan for its classification in this plan. Pines' secured claim uses all of the value of the collateral, and in fact Pines is undersecured. Section 1327(a) provides that the terms of the confirmed plan bind "the debtor and each creditor." And, section 1327© vests the property in the debtor free and clear of liens except as otherwise provided in the plan. Thus, John Deere no longer has a lien on the remaining trailer that is subject to Pines' security interest.

So long as the debtor remains in this chapter 13 and completes the plan payments, this conclusion can not change. Upon completion of plan payments, the debtor will receive a discharge. 11 U.S.C. § 1328(a). Should this case be converted later to one under chapter 7, the valuations fixed in this plan and the allowance of secured claims would apply, "with allowed secured claims reduced to the extent they have been paid in accordance with the chapter 13 plan." 11 U.S.C. § 348(f)(2). It is only if this case later is dismissed that John Deere's avoided lien might have any reinstated value. 11 U.S.C. § 349(b)(1)(C). The Court understands that Pines desires a determination that John Deere's lien is avoided forevermore, but it is unnecessary, and perhaps beyond the Court's Constitutional or statutory jurisdiction, for this Court to give an advisory ruling on what would result if the debtor's case should be dismissed and if John Deere then reasserted its secondary lien.

Because the debtor is operating under a confirmed plan, on which payments are being made to the chapter 13 trustee, and because this opinion and order resolves Pines' remaining objection to confirmation, the Court will deny that objection.

Based upon the foregoing discussion and conclusion, IT IS THEREFORE ORDERED that:

1. Pines' objection to confirmation is denied, and the debtor and the chapter 13 trustee shall proceed to implement the confirmed plan.

2. Pines' request for this Court to avoid the secondary lien of John Deere on the basis that the lien was void as in violation of the contractual terms between the debtor and Pines is denied.

3. John Deere's secondary lien is avoided under 11 U.S.C. § 506(a), as the agreed value on the collateral does not exceed the first lien held by Pines.

SO ORDERED this 22nd day of March, 1996.

WILLIAM HOUSTON BROWN
UNITED STATES BANKRUPTCY JUDGE

cc:

Mr. J. W. Vaughn, Jr.
Attorney for Debtor
187 State Line Road East
Suite 14
Southaven, MS. 38671-3722

Mr. Scott N. Schreiber
Attorney for Pines Trailer Limited Partnership
200 North LaSalle Street
Suite 2100
Chicago, Illinois 60601

Mr. William D. Wilson, Jr.
Attorney for John Deere Employees Credit Union
Post Office Box 17212
Memphis, TN. 38187-0212

Mr. George W. Emerson, Jr.
Chapter 13 Trustee
200 Jefferson Avenue
Suite 1100
Memphis, TN. 38103