UNITED STATES BANKRUPTCY COURT
WESTERN DISTRICT OF TENNESSEE
WESTERN DIVISION

In re

ROBERT E. FARRIS and
HERDY S. FARRIS,
Debtors.

Case No. 96-23448-L
Chapter 13

OZARK FINANCIAL SERVICES, INC.,
Plaintiff,

v.

Adv. Proc. No. 99-0490

MELVIN DAVIS, individually and d/b/a L&L Services,
and ROBERT E. FARRIS,
Defendants

OPINION

BEFORE THE COURT is the motion for partial summary judgment filed by Ozark Financial Services, Inc. ("Ozark"). Ozark seeks a declaration that its perfected lien on a 1989 Volvo truck is superior to a possessory lien held by defendant Melvin Davis d/b/a L&L Services ("Davis") and order requiring Davis to immediately surrender the collateral to Ozark.[1] Neither Davis nor defendant Robert E. Farris ("Farris"), the debtor, responded to Ozark's motion. For the reasons set forth below, the motion will be granted.

[1] In its Complaint, Ozark seeks the following relief:

1. That Ozark's lien be declared superior to Davis' lien;
2. That Davis and/or Farris should be required to surrender collateral immediately to Ozark;
3. That the Court assess sanctions and/or damages against Farris and/or Davis in favor of Ozark;
4. That Ozark be awarded attorney fees; and
5. That costs of the adversary proceeding be assessed against the defendants.

The motion for partial summary judgment seeks a ruling only on issues 1 and 2 of the complaint.

I.

Based upon Ozark's memorandum in support of its motion for partial summary judgment and the affidavits and documents filed in support of the motion, the Court makes the following findings of fact:

1. Ozark is a secured creditor of the debtor by virtue of a Security Agreement Retail Installment Contract executed by the debtor on October 10, 1994, for the purchase of a 1989 Volvo White truck. Ozark perfected its security interest by notation of its lien on the certificate of title.

2. Debtor filed his bankruptcy petition on March 18, 1996. On August 25, 1997, Ozark and the debtor entered into a consent order conditionally denying Ozark's motion for relief from stay. This consent order included a 15-day notice of default provision. In the event the debtor failed to make a chapter 13 plan payment, Ozark could send the debtor a Notice of Default whereby the debtor would have 15 days to cure the default or the stay would be terminated without further order of the court.

3. On or about April 9, 1998, Melvin Davis d/b/a L&L Services prepared a Repair Order for the collateral in the amount of $7,177.14. The repairs were completed in April or May 1998. Davis retained possession of the collateral until August 1998, at which time he relinquished possession to Farris.

4. On February 19, 1999, Ozark filed and served a Notice of Default upon the debtors. The debtors did not properly cure the default. On April 8, 1999, counsel for Ozark sent a letter to

debtors' attorney giving additional notice that the default had not been cured within fifteen days and confirming that the automatic stay was terminated by operation of law.

5. In May 1999, Davis regained possession of the collateral without the authorization of Farris.[2] At that time, Farris knew that Ozark was entitled to possession of the collateral pursuant to its perfected lien and Farris' failure to cure his default pursuant to the August 25, 1997 consent order.

6. Ozark placed Davis on notice of its lien by letter dated June 2, 1999. Counsel for Ozark also spoke with Davis via telephone, demanding the release of the collateral. Davis refused to release the collateral, claiming a possessory lien and retains possession of the collateral at this time.

II.

On a motion for summary judgment, the movant has the initial burden of showing the absence of a genuine issue of material fact. *Celotex Corp. v. Catrett*, 477 U.S. 317, 325, 106 S. Ct. 2548, 2554, 91 L. Ed. 2d 265 (1986) ("the burden on the moving party may be discharged by 'showing' . . . that there is an absence of evidence to support the non-moving party's case"). Under Rule 56(e) of the Federal Rules of Civil Procedure, the burden shifts to the non-movant to "go beyond the pleadings and by . . . affidavits, or by the 'depositions, answers to interrogatories, and admissions on file,' designate 'specific facts showing that there is a genuine issue for trial.'".

[2] In its complaint, Ozark alleges that Farris' employee returned the collateral to Davis with Farris' knowledge. Ozark filed in support of its motion for partial summary judgment an affidavit given by Farris. In that affidavit, Farris stated that the collateral was returned to Dave without his knowledge. This statement is not contradicted in any other filed document.

Celotex Corp., 477 U.S. at 324. That burden is not discharged by "mere allegations or denials." FED. R. CIV. P. 56(e). All legitimate factual inferences must be made in favor of the non-movant. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 255, 106 S. Ct. 2505, 2513, 91 L. Ed. 2d 202 (1986). Rule 56(c) mandates the entry of summary judgment "against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial." *Celotex Corp.*, 477 U.S. at 322. Before finding that no genuine issue for trial exists, the court must first be satisfied that no reasonable trier of fact could find for the non-movant. *Matsushita Elec. Indus. v. Zenith Radio Corp.*, 475 U.S. 574, 587, 106 S. Ct. 1348, 1356, 89 L. Ed. 2d 538 (1986).

III.

The Court must decide what interest Davis has in the collateral and whether that interest has priority over Ozark's perfected security interest. The Court must apply Tennessee law to determine this question as the defendants are Tennessee residents and all transactions in question took place in Tennessee. 28 U.S.C. § 1409. Tennessee Code Annotated § 47-9-310 provides:

> When a person in the ordinary course of his business furnishes services or materials with respect to goods subject to a security interest, a lien upon goods in the possession of such person given by statute or rule of law for such materials or services takes priority over a perfected security interest unless the lien is statutory and the statute expressly provides otherwise.

Tenn. Code Ann. § 47-9-310.

In *Manufacturers Acceptance Corp. v. Gibson*, 422 S.W.2d 435 (Tenn. 1967), the Tennessee Supreme Court held that where a repairman furnishes services and materials in the ordinary course of business to goods which were subject to a security interest, the repairman's lien takes priority so long as the repairman has possession of the collateral. *Id*. at 437. In *Forrest Cate Ford, Inc. v. Fryar*, 465 S.W.2d 882 (Tenn. Ct. App. 1970), the Court of Appeals of Tennessee interpreted the *Manufacturers Acceptance Corp.* case and held that "the repairman must retain possession of the vehicle repaired in order to maintain the priority of his statutory lien . . . over that of a previously perfected security interest." *Id*. at 884 (citations omitted). The question before the Court is whether Davis reinstated his priority when he re-obtained possession of the collateral.

In *Mack Financial Corp. v. Peterbilt of Chattanooga, Inc. (In re Glenn)*, 20 B.R. 98 (Bankr. E.D. Tenn. 1982), the bankruptcy court was faced with the same basic question and held that the repairman lost his priority when he relinquished possession of the collateral. *Id*. at 101. The bankruptcy court noted that possession by the repairman serves two purposes: "[i]t makes the lien possible and it gives notice of the lien." *Id*. at 100. "Once possession is relinquished, the person who did the repairs cannot expect to have it reinstated with priority." *Id*. The court noted that a repairman can protect himself by not releasing the collateral until the bill is paid in full. *Id*. at 101.

This Court finds the *Glenn* case to be persuasive. Davis made repairs to the collateral in April or May of 1998. He retained possession of the collateral until August 1998 when he returned the vehicle to Farris. Davis lost his priority lien at that time. Regaining possession of the collateral

at a later time did not reinstitute priority. The Court, therefore, concludes that Ozark's lien has priority over Davis' interest, whatever it may be, and Ozark is entitled to immediate possession of the collateral.[3] The Court expresses no opinion on whether Davis presently has a lien on the collateral.

IV.

Based upon the foregoing, the Court concludes that no reasonable trier of fact could find for the defendants at trial and that no genuine issues of fact exist. As a result, the motion for partial summary judgment is **GRANTED**. The Court will enter a separate order consistent with this opinion.

BY THE COURT,

_____
JENNIE D. LATTA
United States Bankruptcy Judge

Date:_____

cc: Bruce M. Kahn, Attorney for Ozark Financial Services, Inc.
Benjamin F. Head, Attorney for Melvin Davis, individually and d/b/a L&L Services
Sidney A. Feuerstein, Attorney for Debtor Robert E. Farris

[3] The Court also notes that the collateral in question was at all times pertinent to this proceeding protected by the automatic stay. *See* 11 U.S.C. § 362. By operation of law, the automatic stay terminated as to Ozark only when Farris defaulted on his payments to the chapter 13 trustee, Ozark provided Farris with notice of the default, and Farris failed to cure that default within fifteen days. The automatic stay did not terminate as to any other creditor. Thus, when Davis regained possession of the collateral, he did so in violation of the automatic stay.