NOT FOR PUBLICATION

UNITED STATES BANKRUPTCY COURT
DISTRICT OF NEW JERSEY

In the matter of	:	Case No. 02-11277/JHW
Richard W. Denny, Sr. and Dottie Denny	:	**OPINION ON MOTION FOR RELIEF FROM THE AUTOMATIC STAY**
Debtors	:	

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In this matter, South Jersey Federal Credit Union seeks relief from the automatic stay and turnover of an automobile that serves as collateral for its pre-petition loan to the debtors. The vehicle in question was damaged in a post-petition automobile accident. It was towed to and left at a repair facility. After a lengthy period of time, and following notice to the debtors and to the credit union, the repair facility transferred title to itself and commenced to repair and operate the vehicle. A year later, the debtors stopped making their regular monthly payments on the vehicle to the credit union. The credit union now seeks to access its collateral to apply its proceeds toward the outstanding

loan amount. The repair facility contends that it is now the proper unencumbered titleholder to the vehicle. Alternatively, the facility claims entitlement to a common-law artisan's lien for the repair work that it performed, and it also seeks retroactive relief from the automatic stay to protect its claim.

Because the credit union's perfected security interest has priority over the garage keeper's lien held by the repair facility, and because the repair facility violated the automatic stay when it transferred title to the vehicle, the credit union's motion will be granted and the cross motion of the repair facility for retroactive application of the automatic stay will be denied. The repair facility is directed to turn over the vehicle to the credit union.

FACTS

Richard W. Denny, Sr. and his wife Dottie Denny filed a joint petition for relief under Chapter 13 of the Bankruptcy Code on February 8, 2002. In their list of personal property, debtors scheduled an interest in a 2002 Honda Odyssey with a current market value of $25,000.00. They listed the South Jersey Federal Credit Union ("SJFCU") as a secured creditor with a claim on the vehicle in the amount of $25,000.00. Regular car payments to SJFCU were

to be made in the amount of $450.00 per month. In conjunction with their Chapter 13 plan, debtors proposed to continue making their regular monthly payments on the vehicle outside of the plan, and to make payments of $100 a month for 36 months through the plan to other creditors. Debtors' obligation to SJFCU was not in arrears at the time of the petition filing.

SJFCU filed a proof of claim on March 27, 2002, asserting a secured claim in the amount of $23,637.54. Debtors' Chapter 13 plan was confirmed on June 28, 2002.[1]

In April 2002, the debtors' vehicle was apparently involved in an automobile accident and was taken to Boggs Auto Collision Rebuilders, Inc. in Woodbury, New Jersey ("Boggs") for repairs. The debtors authorized having the vehicle towed, disassembled for a repair estimate and stored with Boggs. While the debtors engaged in discussions with their insurance company regarding the extent of the damage to the vehicle, the vehicle was left in storage with Boggs. The debtors apparently never informed SJFCU of the accident or of the damage to the vehicle. Notwithstanding the fact that the vehicle remained in storage in an inoperable condition, the debtors continued to make their regular monthly

[1] Debtors' Chapter 13 plan was completed in June 2006 and they received their discharge on June 23, 2006.

car payments to SJFCU.

By letter dated November 14, 2003, nonbankruptcy counsel for the Dennys informed Boggs that there was a continuing dispute between the Dennys and their auto insurance company over the amount that should be paid in connection with the debtors' insurance coverage. Counsel noted: "[c]learly, the storage fees greatly exceed the current fair value of the car." He asked that Boggs "please arrange to dispose of the car for whatever salvage value is obtainable . . . to avoid additional charges accruing."[2]

On August 12, 2004, pursuant to N.J.S.A. 39:10A-8 et seq., Boggs sent an "Abandoned Motor Vehicle Repair Facility 30 Day Notice" to the Dennys and to SJFCU, informing them of Boggs' intention to "junk/sell the vehicle, unless [the debtors] and/or the lienholder reclaim possession of the vehicle within 30 days of this letter." The notice required "payment of the reasonable costs of removal and storage of the vehicle, the expenses incurred pursuant to the provisions of this act (N.J.S.A. 39:10A-8 et seq.) and the charges for the

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[2] The debtors received an insurance check in March 2006, payable to the debtors' counsel Segal & Burns, in the amount of $6,391.00. Boggs suggests that SJFCU should pursue its claim against the debtors, debtors' counsel, and/or the insurer for failing to pay the proceeds directly to the credit union. The opportunity to pursue such claims is not presented here, and I do not address any such claims.

servicing or repair of the motor vehicle."

Counsel for SJFCU responded to the 30-day notice by letter dated August 25, 2004, stating:

> I am in receipt of the abandoned motor vehicle repair facility thirty-day notice and I am at a loss as of same. You should be aware that Richard and Dottie Denny filed for bankruptcy protection on February 8, 2002 and [were] assigned case number 02-11277(JHW). I urge you to speak with your counsel to determine whether the recent notice was proper. I also recommend you contact the Dennys' counsel directly to possibly resolve this matter.
>
> In the meantime, please provide me with information concerning the status of the vehicle as well as amounts you claim are due and owing to you so that I can discuss it with the Credit Union.

James Boggs, the owner and operator of Boggs Auto Collision Rebuilders, Inc., replied by letter to SJFCU on the next day, August 26, 2004, stating:

> Enclosed please find the paperwork you requested. The letter from Segal & Burns, PA dated November 14, 2003 request[s] that Mr. & Mrs. Denny furnish the vehicle title to Boggs Auto. We are requesting a title to satisfy the charges against the abandoned vehicle.

The letter attached a copy of the Segal & Burns letter and a copy of an invoice from Boggs detailing towing and storage fees, in the amount of $23,652.66, calculated through July 26, 2004. By letter dated September 8, 2004, counsel for SJFCU replied:

> Thank you for your letter of August 26, 2004. I have discussed the matter with the Credit Union and it has no interest in recovering the vehicle. South Jersey Federal Credit Union hereby denies any responsibility for these charges and will defend any claim for same.

Following receipt of this letter, Boggs contends that it sent the Dennys and SJFCU a 5-day notice of its intent to "junk/sell the vehicle" on October 19, 2004. Counsel for SJFCU has no record of having received this notice. Thereafter, Boggs arranged for title to the vehicle to be transferred to Boggs. The vehicle has since been repaired and has been driven an additional 13,000 miles. It is apparently now titled to James Boggs in his personal capacity.

Nearly 18 months later, on May 10, 2006, SJFCU moved for relief from the automatic stay and for turnover of the vehicle. Nora Phelps, the Assistant Vice President of Loss Prevention for SJFCU, certified that the debtors stopped making post-petition payments outside of the plan after making their September 21, 2005 payment. Following the debtors' bankruptcy filing, the debtors accrued post-petition arrears in the amount of $3,477.44. Ms. Phelps explained:

> Recently, I was advised by the Debtors that they are no longer in possession of the Vehicle. Apparently, at one time, the Vehicle was involved in an incident which required work to be performed. I was told that the work was performed by Boggs Auto Collision Rebuilders of Woodbury, New Jersey. I was told by the Debtors that there was an issue with regard to the repairs performed by Boggs Auto Collision Rebuilders and that the insurance company

> was going to address the problem. Because the Debtors were current with their obligations, the Credit Union informed Boggs Auto Collision Rebuilders that it was not interested in recovering the Vehicle and it denied any responsibility for costs asserted by it.

Because the debtors stopped making their regular car payments outside of the plan, SJFCU now seeks to recover the vehicle. According to the credit union, Boggs holds only a garage keeper's lien under the Garage Keepers and Automobile Repairmen Lien Act, N.J.S.A. 2A:44-21 et seq., which is junior to the credit union's prior perfected security interest in the vehicle. N.J.S.A. 2A:44-21.

Boggs opposes SJFCU's application and contends that it correctly followed New Jersey state law with respect to obtaining legal title to an "abandoned" vehicle. Boggs maintains that it provided the state mandated notice to all interested parties, and that the credit union responded that it had no interest in recovering the vehicle. In the absence of any objections, title was transferred to Boggs. It is noted that at the time that the title was transferred, repairs had not yet commenced on the debtors' vehicle. Boggs' entire claim up until that point was based solely on the towing and storage charges. The repair costs, in the approximate amount of $7,200, were not incurred until after title was transferred to Boggs. Alternatively, Boggs claims entitlement to a New Jersey common-law artisan's lien with respect to the repairs that it made,

citing to Judge Lyons' decision in In re Alston, 322 B.R. 265 (Bankr. D.N.J. 2005),[3] placing Boggs's lien in a priority position over the lien held by SJFCU. Boggs also complains that turning over the vehicle now would result in a windfall to the credit union, and seeks retroactive relief from the automatic stay to validate the transfer of title free of SJFCU's security interest.

DISCUSSION

Section 362(d) provides the grounds for relief from the automatic stay. It states that "[o]n the request of a party in interest," the court "shall grant relief from the stay . . . for cause, including the lack of adequate protection of an interest in property." 11 U.S.C. § 362(d) (emphasis added). The court's discretion to grant relief in this regard is broad. In re Mirant Corp., 440 F.3d 238, 251-52 (5th Cir. 2006); In re Dairy Mart Convenience Stores, Inc., 351 F.3d 86, 91 (2d Cir. 2003); In re Williams, 144 F.3d 544, 546 (7th Cir. 1998) ("Although this section is written in mandatory terms, the bankruptcy court has discretion whether and to what extent it will grant relief from the stay."). The court may grant such relief by "terminating, annulling, modifying, or conditioning" the stay. 11 U.S.C. § 362(d). Section 362(d)(1) lists a lack of

[3] Alston involved liens asserted against fire insurance proceeds resulting from damages to real property. The case does not involve the garage keeper's act and is clearly distinguishable here.

adequate protection as one example of relief "for cause," but the Code does not otherwise "define 'cause,' leaving courts to consider what constitutes cause based on the totality of the circumstances in each particular case." In re Wilson, 116 F.3d 87, 90 (3d Cir. 1997).

To determine whether the credit union is entitled to relief from the stay, and whether Boggs is entitled to retroactive relief from the stay, we must untangle the competing claims of the parties to the vehicle's title, and resolve the priority of the liens held by each party. Prepetition, the Dennys were the owners and operators of the Honda Odyssey. SJFCU held a perfected security interest in the vehicle. When the debtors filed for bankruptcy in February of 2002, their vehicle became property of the bankruptcy estate. 11 U.S.C. § 541(a). SJFCU filed a secured proof of claim. After the vehicle was damaged post petition, it was towed to and stored with Boggs. The resulting storage costs gave rise to a Garage Keepers and Automobile Repairmen's lien under New Jersey state law. See N.J.S.A. 2A:44-20 et seq.[4] By operation of the

[4] Under the Garage Keeper's Act, "[a] garage keeper who shall store, keep or repair a motor vehicle . . . at the request or with the consent of the owner . . . shall have a lien upon the motor vehicle" for the resulting costs. N.J.S.A. 2A:44-21. Boggs appears to qualify as a "garage keeper" for purposes of the Act. A "garage" is defined as "a place or structure used in the business of storing, maintaining, keeping or repairing motor vehicles." N.J.S.A. 2A:44-20. A "garage keeper" is "a person or corporation engage in the business of keeping a garage as above defined." Id.

applicable statute, the garage keeper's lien acquired by Boggs is subordinate to SJFCU's prior perfected security interest. N.J.S.A. 2A:44-21 (The garage keeper's "lien shall not be superior to, nor affect a lien, title or interest of a person held by virtue of a . . . prior security interest perfected in accordance with chapter 9 of Title 12A of the New Jersey Statutes."). Because the Dennys were now in bankruptcy, section 362 of the Bankruptcy Code prevented Boggs from taking any action to exercise control over the vehicle, 11 U.S.C. § 362(a)(3), or to enforce its garage keeper's lien, 11 U.S.C. § 362(a)(4).

On August 12, 2004, apparently without notice of the debtors' bankruptcy, Boggs attempted to exercise its state laws remedies, pursuant to N.J.S.A. 39:10A-8 et seq.[5] Boggs sent an "Abandoned Motor Vehicle Repair Facility 30 Day Notice" to the Dennys and SJFCU informing them of its

[5] Under New Jersey law, a motor vehicle is deemed to be abandoned if it is left at a repair facility for a period in excess of 60 days without an attempt by the owner or any other interested party to take possession of it. N.J.S.A. 39:10A-8. Once the vehicle is determined to be abandoned, the repair facility then has the option under state law to remove and store the vehicle, to sell it at private or public auction, or to cause a junk title certificate to be issued. N.J.S.A. 39:10A-9. Prior to storing or obtaining a junk title certificate, the repair facility is required to provide a thirty day notice to the owner "or other person having a legal right" to the vehicle of their intentions. N.J.S.A. 39:10A-10, -12. Prior to exercising their right to sell the abandoned vehicle, the repair facility must give the owner and the lien holder thirty days notice of their intent to sell and at least 5 days notice of the date, time, place and manner of the sale. N.J.S.A. 39:10A-11.

intention to "junk/sell the vehicle," unless the Dennys or SJFCU paid the storage costs and reclaimed the vehicle. The credit union's August 25th response placed Boggs on notice of the debtors' bankruptcy. Despite this knowledge and without seeking prior relief from the automatic stay, Boggs proceeded under state law to have title transferred to itself.

The steps taken by Boggs to transfer title to itself, while in apparent compliance with state law, nevertheless violated the Bankruptcy Code. Under Third Circuit precedent, actions taken in violation of the automatic stay are void ab initio. Acands, Inc. v. Travelers Cas. and Sur. Co., 435 F.3d 252, 261 (3d Cir. 2006); Constitution Bank v. Tubbs, 68 F.3d 685, 692 (3d Cir. 1995). See also In re Siciliano, 13 F.3d 748, 750 (3d Cir. 1994) (recognizing an exception to the general principle that actions taken in violation of the automatic stay are void ab initio). Boggs' request for retroactive relief from the stay notwithstanding, which I will address infra, the transfer of title in violation of the automatic stay is void and will be reversed, placing the parties back in the position that they were in prior to the transfer - i.e., the debtors are reinstated as the owners, SJFCU is the senior lienholder and Boggs holds a subordinate garage keepers' lien on the vehicle.

Following the unauthorized transfer of title, Boggs performed repairs on

the vehicle and commenced to operate it. With regard to these repairs, Boggs now seeks the imposition of a New Jersey common-law artisan's lien. Instructive on this point are the cases of Ferrante Equipment Co. v. Foley Machinery and Associates Commercial Corporation v. Wallia.

In Ferrante Equip. Co. v. Foley Machinery Co., 49 N.J. 432, 231 A.2d 209 (1967), the New Jersey Supreme Court granted a repairman a common-law artisan's lien on a bulldozer following a determination that the bulldozer was not a "motor vehicle." The Court noted that although "there is no statute establishing an artisan's lien," "New Jersey recognizes the common-law possessory artisan's lien." 231 A.2d at 210. The Court explained that

> To achieve the status of such a lien holder with respect to personal property, the artisan, by his labor and skill, must contribute to the improvement of the personal property. If the artisan improves, betters, or repairs the property and thus enhances the value of the property by his skill, labor or materials, he acquires the right to a specific lien on the property. He retains this interest in the property until paid. The lien includes the right to retain possession of personal property until the debt is paid.

Id. Significantly, the "holder of an artisan's lien takes priority over the holder of a perfected security interest under the Uniform Commercial Code, N.J.S. 12A:1-101 et seq." Id. In contrast, the Garage Keeper's Act only applies to motor vehicles, and the Act "specifically provides that a garage keeper's lien is subordinate to any perfected security interest." Id. at 211. The Court stressed

that repairs made to motor vehicles were governed by the Garage Keeper's Act, while any other work done to other personalty would be eligible for an artisan's lien. Id. The threshold question therefore was whether the bulldozer qualified as a "motor vehicle" for purposes of the Garage Keeper's Act. If it was found to be a motor vehicle, the repairman was only entitled to a garage keeper's lien. Id. at 211. If it was not, the defendant could seek a common-law artisan's lien. Concluding that the Legislature intended the term "motor vehicle" to mean vehicles that can be used on public highways, the Court determined that the Garage Keeper's Act did not apply, and recognized the attachment of a common-law artisan's lien. Id. at 212.

In Associates Commercial Corp. v. Wallia, 211 N.J. Super. 231, 511 A.2d 709 (App. Div. 1986), the Appellate Division revisited this question in the context of a tractor. Citing to Ferrante, the court noted that

> a garage keeper who performs work on an automobile "has only a garage keeper's lien" under the Garage Keeper's Lien Act and "can claim only the statutory lien.'" Thus, only if the personal property worked on is "not a motor vehicle" can a garage keeper claim the status of a holder of an artisan's lien, and the priority enjoyed by it.

511 A.2d at 715. Because Wallia acknowledged that the tractor was "a motor vehicle, it [could] not claim an artisan's lien." Id. The court concluded that "even if [the] defendant did enhance the tractor's value, it may not claim an

artisan's lien at common law and its attendant priorities." Id. at 716. See also Bruce G. M. Diesel, Inc. v. Associates Financial Servs. Co., 125 N.J. Super. 53, 308 A.2d 373 (App. Div. 1973) (person repairing a motor vehicle is only entitled to a garage keeper's lien and not an artisan's lien). Regarding the resulting unjust enrichment following the repairs to the tractor, the court agreed "that a functioning tractor will bring more at an auction sale than a nonfunctioning one." Id. The court determined, however, that in this case, the repairs were not ordered and that the defendant never really expected to be paid for the work done. The defendant could have taken steps to protect its position before commencing the repairs, but it failed to do so. The claim for unjust enrichment was denied.[6]

There is no question here that we are dealing with a motor vehicle. At the time of the transfer of title, Boggs was entitled to a garage keeper's lien for the storage and towing charges under state law.[7] By state statute, such lien was subordinate to the credit union's perfected security interest. Repairs performed by Boggs after improperly taking title to the vehicle were performed at its own risk. We cannot support the creation of an artisan's lien on these

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[6] We do not reach on this record whether Boggs is entitled to a claim for unjust enrichment.

[7] The amount of that lien and whether or not it rightfully included the costs for the repairs made is not before the court on this motion.

facts. Boggs' request in this regard is denied.

Because the transfer of title to the vehicle was unauthorized, the transfer is void and must be reversed. SJFCU holds a perfected security interest in the vehicle, which has priority over a garage keeper's lien under New Jersey law. The credit union's motion for relief from the automatic stay may be granted.

As to Boggs' request for retroactive relief from the automatic stay, Boggs poses several bases to justify its decision to proceed without relief. Boggs asserts that if it had timely sought relief from the automatic stay prior to the transfer of title to the vehicle, relief would have been afforded. At the time title to the vehicle was transferred in or about October 2004, the debtors did not have equity in the vehicle, and the vehicle was not necessary for the debtors' effective reorganization. Therefore, Boggs would have been entitled to relief under 11 U.S.C. § 362(d)(2). As well, Boggs submits that neither the debtors nor the credit union would have objected to relief from the stay in favor of Boggs at the time. The debtors have not participated in the stay relief motions pending at this point, and have not sought access to the vehicle since the collision in 2002. As to the credit union, by letter dated September 8, 2004, prior to the transfer of title, SJFCU's counsel indicated that the credit union had "no interest in recovering the vehicle". Boggs' theory is that if a successful

stay relief motion could have been filed in September 2004, retroactive relief from the stay is available to validate the transfer of title to the vehicle.

Boggs is correct that retroactive relief from the stay is available under 11 U.S.C. § 362(d). In In re Siciliano, 13 F.3d 748 (3d Cir. 1994), the court noted the general principle that any credit or action taken in violation of an automatic stay is void *ab initio*. The court recognized an exception to that rule, focusing on the opportunity to "annul" the automatic stay under § 362(d). See 11 U.S.C. §362(d) (emphasis added) ("On request of a party in interest and after notice and a hearing, the court shall grant relief from the stay provided under subsection (a) of this section, such as by terminating, annulling, modifying or conditioning such stay."). The court reflected that the word "annuling" in this statute "indicates a legislative intent to apply certain types of relief retroactively and validate proceedings that would otherwise be void ab initio." Id. at 751.

Notwithstanding the opportunity to grant stay relief retroactively, and to validate a transfer of title that occurred in violation of the automatic stay, I conclude that such relief must be denied for several reasons. First, it must be noted that Boggs proceeded to take action to collect its debt against the debtor utilizing state law procedures after it was advised by the credit union that the debtors had filed a bankruptcy case, and that counsel should be consulted

about the implications regarding the bankruptcy filing. Boggs paid no heed to the bankruptcy filing, and appears to have willfully violated the automatic stay by failing to seek relief from the stay prior to taking action against property of the estate.[8] By way of comparison, in Siciliano, the mortgagee's attempt to validate a foreclosure sale that occurred following the filing of the debtor's bankruptcy case, in violation of the automatic stay, was predicated upon the fact that the neither the mortgagee nor the sheriff knew of the bankruptcy filing at the time the foreclosure sale was conducted.[9]

Second, when the September 8, 2004 letter from SJFCU, in which the

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[8] Such action may well have constituted a willful violation of the automatic stay. A "willful" violation of the stay occurs when the creditor violates the automatic stay with knowledge that the debtor has already filed a petition in bankruptcy . In re Landsdale Family Restaurants, Inc., 977 F.2d 826, 829 (3d Cir. 1992); In re University Medical Center, 973 F.2d 1065, 1087-88 (3d Cir. 1992). The movant need not show that the creditor had a specific intent to violate the stay, only that the acts taken were intentional. Id. See also In re Krystal Cadillac-Oldsmobile GMC Truck, Inc. v. General Motors Corp., 337 F.3d 314, 320 n.8 (3d Cir. 2003). The creditor's "good faith" belief at the time that he was not violating the automatic stay provision is not determinative of willfulness for purposes of section 362. Id. See also University Medical Center, 973 F.2d at 1088; In re Atlantic Business & Community Corp., 901 F.2d 325, 329 (3d Cir. 1990).

[9] In Siciliano, the court did not address the criteria to be utilized to determine when relief from the stay may be applied retroactively to validate proceedings or transfers that would otherwise be void *ab initio*. The fact pattern is nevertheless instructive to reflect upon the type of circumstance that caused the Circuit to remand the matter to the bankruptcy court to consider the annulment of the automatic stay.

credit union expressed "no interest in recovering the vehicle", was written, the debtors were not in default on their monthly car payments. The debtors' plan proposed to pay the SJFCU obligation in full outside of their Chapter 13 plan. The automatic stay was in place at the time to protect the security interest of the credit union, so that the recovery of the vehicle by SJFCU was not necessary to retain the credit union's collateral position. What SJFCU might have done in response to a motion to vacate stay by Boggs is at least unclear. More likely than an acquiescence to the motion might have been a quest to resolve the respective priorities of the parties as between the credit union's perfected security interest and the garage keeper's lien held by Boggs.

I conclude that SFCU's motion for relief from the stay will be granted. The cross motion by Boggs for the annulment of the automatic stay and retroactive application of relief from the stay to validate the transfer of title to the vehicle is denied. The transfer of title to the vehicle is invalidated. Boggs is directed to transfer title to the vehicle back to the debtors, with the lien of the credit union reimposed. The vehicle must be turned over to SJFCU.

Counsel for SJFCU will submit an order in conformance with this opinion.

Dated: September 28, 2006

JUDITH H. WIZMUR
CHIEF U.S. BANKRUPTCY JUDGE