FILED
U.S. Bankruptcy Appellate Panel
of the Tenth Circuit
January 14, 2005
Barbara A. Schermerhorn
Clerk

NOT FOR PUBLICATION

UNITED STATES BANKRUPTCY APPELLATE PANEL

OF THE TENTH CIRCUIT

IN RE KENNETH SCHOENHALS and PEGGY A. SCHOENHALS, Debtors.	BAP No. WO-04-070
BIDDLE SHELBY, doing business as Service Engine & Equipment Co., Appellant, v. FARMERS & MERCHANTS BANK, Appellee.	Bankr. No. 03-24014 NLJ Chapter 12 ORDER AND JUDGMENT*

Appeal from the United States Bankruptcy Court
for the Western District of Oklahoma

Before McFEELEY, Chief Judge, CLARK, and BROWN, Bankruptcy Judges.

PER CURIAM.

The parties did not request oral argument, and after examining the briefs and appellate record, the Court has determined unanimously that oral argument would not materially assist in the determination of this appeal. Fed. R. Bankr. P. 8012. The case is therefore ordered submitted without oral argument.

Biddle Shelby (Shelby) timely appeals a final Order of the United States Bankruptcy Court for the Western District of Oklahoma disallowing his secured

* This order and judgment is not binding precedent, except under the doctrines of law of the case, res judicata, and collateral estoppel. 10th Cir. BAP L.R. 8018-6(a).

claim against the Chapter 12 debtors.[1] The parties have consented to this Court's jurisdiction because they have not elected to have this appeal heard by the United States District Court for the Western District of Oklahoma.[2] For the reasons set forth below, we AFFIRM.

I. Background

The debtors owned a tractor. It is undisputed that Farmers & Merchants Bank (Bank) held a perfected purchase money security interest against the tractor at all times relevant to this appeal.[3]

Shelby, doing business as Service Engine & Equipment Co., took possession of the tractor for various intervals during 2000 and 2003 to repair it for the debtors. Relevant to this appeal is Shelby's possession in early May 2003, when he supplied numerous parts and performed a significant amount of labor to repair the tractor. Although the debtors did not pay him for his services, Shelby released possession of the tractor to the debtors so that they could use it to farm their land. After it was released to the debtors, the debtors allowed their neighbor to use it to farm his land and their land. Several months later, in November 2003, Shelby again took possession of the tractor to repair it, and he retained possession of it at all relevant times thereafter.

The debtors filed their Chapter 12 petition in December 2003. Shelby filed a proof of claim in the debtors' case, asserting a secured claim based, in relevant part, on a "valid, perfected, possessory garageman's lien" against the tractor. In support of his claim, Shelby attached Invoice No. 8071, dated May 16, 2003, showing that the debtors owed him $18,492.14 for the parts and labor that he supplied in early May for repair of the tractor (May Invoice). There are no other

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1 28 U.S.C. § 158(a)(1); Fed. R. Bankr. P. 8002(b).

2 28 U.S.C. § 158(b)-(c); Fed. R. Bankr. P. 8001(e).

3 Appellant's Brief at 5; Transcript at 8, Appellant's Appendix at 26.

Invoices attached to the proof of claim related to the tractor.[4]

The debtors' Chapter 12 plan allegedly proposed to pay Shelby the fair market value of the tractor, thus affording his claimed lien priority over the Bank's undisputed lien. The Bank objected to Shelby's proof of claim, arguing that Shelby did not have a lien against the tractor for the May Invoice-work because he had voluntarily relinquished possession of the tractor after the work was performed. Shelby responded to the Bank's objection, continuing to assert the validity and priority of his lien.

At an evidentiary hearing on the Bank's objection, Shelby testified that, although he had relinquished possession of the tractor after performing the May Invoice work, he intended to continually assert a lien against it for the labor and materials that he had provided. There was no evidence Shelby affirmatively told anyone about his lien. Rather, Shelby testified that he knew he had a lien, and he never told anyone that he did not intend to claim a lien. He also stated that he had an agreement with the debtor-husband related to the debtors' use of the tractor. The debtor-husband testified that he understood that Shelby had made significant repairs to the tractor, but he did not state that he and Shelby had an agreement related to the lien. Rather, he testified that he never told his neighbor who used the tractor that Shelby's lien had been released, and he stated that his testimony would not differ from Shelby's as to their agreement related to the tractor.

At the close of the hearing, the bankruptcy court issued its findings of fact and conclusions of law on the record. It found that Shelby's lien against the tractor for the May Invoice work had been extinguished because Shelby had voluntarily relinquished possession of the tractor to the debtors, and there was no

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[4] There are two additional Invoices attached to Shelby's proof of claim other than the May Invoice. These Invoices are not relevant to this appeal.

evidence that the debtors and Shelby had an agreement that Shelby's lien would continue after the debtors regained possession of the tractor. The bankruptcy court later entered a separate Order stating that "the claim of Biddle Shelby is disallowed as secured, but that it is allowed as an unsecured claim."[5]

This appeal followed.

II. Discussion

It is undisputed that before Shelby released possession of the tractor to the debtors, he had a special lien against it for his May Invoice services by operation of law under § 91(A)(1) of title 42 of the Oklahoma Statutes. This § 91(A)(1) lien had priority over the Bank's perfected security interest against the tractor.[6] Section 91(A)(1) states:

> Any person who, while lawfully in possession of an article of personal property, renders any service to the owner thereof by furnishing material, labor or skill for the . . . improvement . . . thereof, has a special lien thereon, dependent on possession, for the compensation, if any, which is due to such person from the owner for such service[.][7]

The issue in this case is whether the bankruptcy court erred in determining that Shelby's lien was extinguished when he voluntarily relinquished possession of the tractor to the debtors after performing the May Invoice services. We conclude that the bankruptcy court did not err.

Section 25 of title 42 of the Oklahoma Statutes provides: "The voluntary restoration of property to its owner, by the holder of a lien thereon, dependent upon possession, extinguishes the lien as to such property, unless otherwise

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[5] Order at 1, Appellant's Appendix at 18.

[6] Okla. Stat. tit. 12A, § 1-9-333(b); *see Commerce Acceptance of Okla. City, Inc. v. Press*, 428 P.2d 213 (Okla. 1967) (interpreting predecessor to § 1-9-333).

[7] Okla. Stat. tit. 42, § 91(A)(1)

agreed by the parties . . . ."[8] Here, there is no dispute that Shelby's § 91(A)(1) lien is dependent on possession, and Shelby voluntarily restored the tractor to the debtors after the lien arose. Furthermore, there is no evidence of an agreement between Shelby and the debtors related to Shelby's lien. The only evidence is that Shelby and the debtor-husband had an agreement related to use of the tractor. Accordingly, the bankruptcy court did not err in concluding that Shelby's lien was extinguished, and that his claim for the May Invoice work is wholly unsecured.

Shelby argues that the bankruptcy court erred in holding that his lien was extinguished under § 25 because, although he did not have actual possession of the tractor, he had constructive possession of it, and under § 91(B)(4) of title 42 of the Oklahoma Statutes, constructive possession is sufficient to retain a § 91(A)(1) lien. This argument is without merit as a matter of law because § 91(B)(4) does apply to a lien created under § 91(A)(1).

Section 91(B)(4) states: "For purposes of *this* subsection: . . . 'Possession' includes actual possession and constructive possession[.]"[9] By its express terms, therefore, the actual/constructive definition of "possession" set forth in § 91(B)(4) applies only to the use of the word "possession" in subsection (B) of § 91, not to use of that word in subsection (A), the subsection under which Shelby's lien was created.[10]

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[8] *Id.* § 25; *see Jones v. Bodkin*, 44 P.2d 38, 40 (Okla. 1935) (continuous possession necessary to assert lien); *accord Wat Henry Car Leasing v. Oliver*, 550 P.2d 995 (Okla. App. 1976).

[9] Okla. Stat. tit. 42, § 91(B)(4)(a) (emphasis added).

[10] Subsection (B) provides for two situations in which a special lien is created or continued despite the lienholder's lack of possession of collateral. First, the special lien created under § 91(A)(1) will continue to exist if the lienholder "is induced by means of a check or other form of written order for immediate payment of money to deliver up possession" of the property and the "check or other written order is dishonored" or "not paid when presented[.]" *Id.*

(continued...)

Even if § 91(B)(4) applies to a § 91(A)(1) lien, Shelby's constructive possession argument is without merit because he did not present any evidence showing such possession. "Constructive possession" is defined as–

> possession by a person who, although not in actual possession, does not have an intention to abandon property, knowingly has both power and the intention at a given time to exercise dominion or control over the property, and who holds claim to such thing by virtue of some legal right.[11]

There was no evidence that Shelby knowingly had the intention to exercise dominion or control over the tractor. Indeed, after Shelby restored the tractor to the debtors, they allowed their neighbor to use it, and the neighbor testified that he never had contact with Shelby or knew of Shelby's arrangements with the debtors.

Shelby also claims that the bankruptcy court erred in extinguishing his lien against the tractor because, although he voluntarily restored the tractor to the debtors after he provided services and materials to improve it, the evidence shows that he and the debtors had an "agreement" within the meaning of § 25 that his § 91(A)(1) lien would continue. We agree with the bankruptcy court that no evidence of such an agreement exists.

Finally, Shelby asserts that "the Bankruptcy Court erred when it did not determine that if [he] lost his possessory lien by giving up possession, he did not obtain that same possessory lien in November, 2003 when he obtained possession of the tractor."[12] Other than making this statement, however, Shelby has in no

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[10] (...continued)
§ 91(B)(1)(a). Second, a special lien is created if property on which services have been performed "is removed from the [service provider's] possession, without such person's written consent or without payment for" service. *Id.* § 91(B)(2)(a). No one maintains that either of these provisions apply.

[11] *Id.* § 91(B)(4)(b).

[12] Appellant's Brief at 4.

way addressed this issue and, therefore, it is deemed waived.[13] Even if it had been argued, we agree with the Bank that "it would seem inconsistent that an extinguished lien can . . . be re-vitalized by any act."[14] Shelby could assert a § 91(A)(1) first priority lien against the tractor for prepetition services rendered after November 2003 inasmuch as it is undisputed that he had continuous possession of the tractor from November 2003 until the debtors' petition date, but he has never asserted such a claim.

III. Conclusion

The bankruptcy court's Order is AFFIRMED.

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[13] *See, e.g., Gross v. Burggraf Constr. Co.*, 53 F.3d 1531, 1547 (10th Cir. 1995) (issues not adequately briefed will not be considered); *Ambus v. Granite Bd. of Educ.*, 975 F.2d 1555, 1558 n.1 (10th Cir. 1992) (an issued mentioned in an appellate brief, but not addressed, is waived), *modified on other grounds on reh'g*, 995 F.2d 992 (10th Cir. 1993).

[14] Appellee's Brief at 6.