

IN THE UNITED STATES BANKRUPTCY COURT  
FOR THE NORTHERN DISTRICT OF TEXAS  
FORT WORTH DIVISION

IN RE:

JOLENE MARIE FORSBERG,  
Debtor.

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CASE NO. 03-40983-DML-13

**MEMORANDUM OPINION AND ORDER**

Before the court is the Motion for Relief from Stay (the “Motion”) filed by Local Telecom Service, LLC (“LTS”) by which LTS seeks modification of the automatic stay in order to pursue recovery under a writ of garnishment (the “Writ”) issued by the 352<sup>nd</sup> District Court, Tarrant County, Texas (the “Garnishment Court”). Specifically, LTS wishes to reach certain funds held in the trust account of DeForrest N. Tiffany (“Tiffany”) pursuant to orders of the 231<sup>st</sup> District Court, Tarrant County (the “Divorce Court”), in which Debtor (“Mrs. Forsberg” or “Debtor”) has pending a suit for divorce (the “Divorce Action”) from her husband (“Mr. Forsberg” and, with Mrs. Forsberg, the “Forsbergs”). LTS has intervened in the Divorce Action, and this court must now decide whether LTS should be permitted to proceed in the Divorce Court. This matter was heard by the court on May 8, 2003, and both parties have provided the court with authorities in support of their positions. The court has jurisdiction over this contested matter by virtue of 28 U.S.C. §§ 1334(a) and 157(b)(2)(G). This Memorandum Opinion constitutes the court’s findings of fact and conclusions of law. FED. R. BANKR. P. 7052 and 9014.

## **I. Background**

The instant dispute arises from Mr. Forsberg's past involvement in FTS as a partner. Following litigation between FTS and Mr. Forsberg, the Garnishment Court on May 3, 2002 entered a Final Summary Judgment in favor of FTS and against Mr. Forsberg in the amount of \$1,360,730.16 plus prejudgment interest of \$27,878.00 and post judgment interest at the rate of 10% per year.

Prior to that time, on July 26, 2001, Mrs. Forsberg had commenced the Divorce Action against Mr. Forsberg. On April 11, 2002, Mrs. Forsberg filed a motion in the Divorce Action seeking, *inter alia*, authority to sell the Forsbergs' homestead. On April 29, 2002, the Divorce Court entered its Order Granting Sale of Residence (the "Sale Order"). The Sale Order provided that Mrs. Forsberg could sell the homestead and further directed that she "receive and hold for future equitable division and then distribution . . . the net proceeds" of sale.

Sale of the Forsbergs' homestead resulted in net proceeds of \$80,885.47. By order of the Divorce Court of May 23, 2002 (the "Deposit Order")<sup>1</sup>, these proceeds were directed to Tiffany's trust account, and Tiffany was ordered "to keep and maintain said funds in his trust account until further order of the Court." On July 19, 2002, the Divorce Court entered an order directing distribution of some of the funds held by Tiffany in satisfaction of attorneys' fees.

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1 The Deposit Order was agreed to by counsel for Mr. Forsberg and Mrs. Forsberg.

The balance<sup>2</sup> of the sale proceeds held by Tiffany remained in his trust account. On October 30, 2002, LTS obtained the Writ from the Garnishment Court directed to Tiffany.<sup>3</sup> Tiffany was served with the Writ, and on November 4, 2002, LTS filed its intervention in the Divorce Action. On December 9, 2002, LTS filed in the Divorce Court a motion for summary judgment asking that the Divorce Court direct distribution of the funds held by Tiffany to LTS.

LTS's motion for summary judgment was set for hearing on January 30, 2003. On January 29, Mrs. Forsberg filed her petition seeking relief under chapter 13 of the Bankruptcy Code. On March 18, Debtor filed her schedules, claiming as exempt under Texas's exemption laws the approximately \$65,000 of sale proceeds still held by Tiffany. On March 24, Debtor filed an amended schedule C which also claimed the sale proceeds as exempt.

On April 15, 2003, Debtor's meeting of creditors pursuant to section 341 of the Bankruptcy Code was held. As of this writing, no objection has been made to Debtor's claimed exemptions.

## **II. The Issue**

The argument of the parties has run to the question of whether or not the Sale Order and Deposit Order tolled the six month time period provided by TEXAS PROPERTY CODE ART. 41.001(c) during which proceeds of sale of a homestead are exempt (if other requirements are met). If the Sale Order and the Deposit Order tolled the running of the six month period, the Writ did not serve to impose a lien on the proceeds, and Mrs. Forsberg's rights to them passed

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2 As the amount remaining with Tiffany at this writing appears to be less than the resulting balance after giving effect to the July 19 order, the court assumes additional disbursements have been authorized.

3 The Forsbergs have each answered the garnishment action in the Garnishment Court.

free of any lien into Debtor's estate, subject to exemption under Texas law and section 522 of the Bankruptcy Code. If the Sale Order and Deposit Order did not effect a tolling, then, at the end of the six month period (on October 30, 2002), the proceeds would have become encumbered by the Writ.

While the ultimate result of the dispute from the perspective of the parties turns on the tolling issue, however, the court is faced with a different question. The court must determine whether or not the automatic stay of section 362 should be modified to permit further proceedings in the Divorce Court respecting LTS's intervention.<sup>4</sup> The answer to this question does not necessarily depend on the tolling issue.

### **III. Discussion**

#### **A. The Exemption**

Debtor has claimed the sale proceeds as exempt in her schedule C. FED. R. BANKR. P. 4003(b) provides, "A party in interest may file an objection to the list of property claimed as exempt within 30 days after the meeting of creditors held under § 341(a) is concluded . . . ." Debtor's § 341(a) meeting was held on April 15, 2003. According to the Report of 341 Meeting filed by the Chapter 13 standing trustee, the meeting was not adjourned, and, therefore, was concluded that day. Thus, the deadline for objecting to Debtor's claim that the sale proceeds were exempt was May 15, 2003.

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<sup>4</sup> As the Divorce Action was initiated by Debtor, the stay of section 362(a) of the Bankruptcy Code does not prevent continued proceedings in it between Mr. Forsberg and Mrs. Forsberg.

No party (including LTS) has objected to the claimed exemption. If a party does not object within the 30 day period, the property will be treated as exempt, even if there is no colorable basis for the exemption. *Taylor v. Freeland & Kranz*, 503 U.S. 638, 112 S.Ct. 1644 (1992). Consequently, for purposes of this chapter 13 case, the sales proceeds are exempt – as to Debtor; as to any share of the proceeds ultimately awarded to Mr. Forsberg, the Debtor’s claim of exemption would be ineffective.

If the sales proceeds are exempt, they came into the estate on the filing of Debtor’s petition having that character. This would be true whether or not the sales proceeds were encumbered by any lien arising from the Writ<sup>5</sup>. On the other hand that they are exempt by operation of Rule 4003(b) does not mean LTS has no lien on them. Whether the Writ attached to the sale proceeds is dependent on whether the Sale Order and the Proceeds Order tolled the running of the six month period during which homestead sales proceeds are exempt under Texas law.

B. Tolling

Texas law is uncertain, first, as to whether the six month period under Article 41.1001(c)6 can be tolled; and second, if tolling can occur, under what circumstances. The Texas Supreme Court has not addressed either of these issues, and this court’s research reveals

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5 The court recognizes but need not address at this time the potential applicability of section 522(f)(1)(A) of the Bankruptcy Code – or other avoidance provisions available to Debtor.

6 According to the Texas Property Code:  
The homestead claimant’s proceeds of a sale of a homestead are not subject to seizure for a creditor’s claim for six months after the date of sale. TEX. PROP. CODE ANN. § 41.001(C) (Vernon 1984 & Supp. 1997).

only one Texas court that has extended the period of protection beyond six months from the date of the sale.<sup>7</sup> Furthermore, the federal courts that have addressed Art. 41.001(c) have not considered the issue of tolling specifically or specifically adopted the reasoning in *Jones* with respect thereto. *See Zibman v. Tow (In re Zibman)*, 268 F.3d 298 (5th Cir. 2001); *See also In re Malone*, 201 B.R. 175 (Bankr. W.D. Tex. 1996). Thus, with equitable tolling not a well settled doctrine of Texas law, this court is hesitant to deem the proceeds from the sale of Debtor's homestead protected under Article 41.001(c).

### C. Interpretation of Orders

Not only has state law not crystallized on the issue of equitable tolling. Whether any such tolling occurs depends on interpretation of the Sale Order and the Deposit Order. The court best able to determine the meaning and effect of these orders is the Divorce Court. *See County of Suffolk v. Stone & Wester Engineering Corp.* 106 F.3d 1112, 1117 (2nd Cir. 1997); *see also Harrison v. Metropolitan Gov't of Nashville & Davidson County*, 80 F.3d 1107, 1119 (6th Cir.) *cert. denied*, 519 U.S. 863, 1117 S.Ct. 169, 136 L.Ed.2d 111 (1996).

Moreover, it would be more consistent with the principles of comity to give the Divorce Court an opportunity to determine the question of equitable tolling. That way, it will be the court that entered the orders which determine their effect. It will also be a state court that considers an important and uncertain issue of state law.

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7 *See Jones v. Maroney*, 619 S.W.2d 296, 297-8 (Tex. Civ. App.—Houston [1<sup>st</sup>] 1981)(period of protection

#### **IV. Conclusion**

For the foregoing reasons, the court concludes that the automatic stay of section 362(a) of the Bankruptcy Code should be modified for the limited purpose of permitting determination by the Divorce Court of the question of whether its orders tolled the six month period provided by TEXAS PROPERTY CODE 41.001(c) such that no lien could attach to the sale proceeds held by Tiffany pursuant to such orders. LTS is granted relief from the stay solely to present this question to the Divorce Court for determination, and not for any other purpose (including inquiry into whether the sales proceeds otherwise meet the requirements of Art. 41.001(c)).

It is so ORDERED.

Signed this the 2nd day of June 2003.

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DENNIS MICHAEL LYNN,  
UNITED STATES BANKRUPTCY JUDGE

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of proceeds from the sale of a homestead extended pending resolution of an abstract of judgment).

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