ORIGINAL

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

IN RE:	§	
	§	
JAMES RILEY DAVIS,	§	CASE NO. 00-50589-SAF-11
DEBTOR.	§	
	§	
RIDDELL FLYING SERVICE, INC.,	§	
PLAINTIFF,	§	
	§	
VS.	§	ADVERSARY NO. 00-5061
	§	
JAMES RILEY DAVIS,	§	
DEFENDANT.	§	

MEMORANDUM OPINION AND ORDER

First Bank of West Texas moves the court for summary judgment declaring that it holds a perfected first lien in two aircraft and dismissing the claims of Riddell Flying Services, Inc., for conversion and due process violations. Riddell does not dispute the bank's first lien position on the two aircraft. Riddell does, however, contend that it had an ownership interest in the aircraft entitling it to due process and state law notice of the sale of the aircraft by the lienholder. Riddell cross-moves for summary judgment on the issue of its ownership interest as well as on the notice and conversion issues. The bank opposes the cross-motion. The court conducted a hearing on the motions on June 26, 2002.

Riddell contends that the bank sold the aircraft, without providing the necessary statutory or constitutional notice to Riddell, in a commercially unreasonable manner, thereby converting or taking Riddell's interest in property. Riddell asserts that if it had received notice, then it could have protected its interest. Riddell further argues that had the bank sold the aircraft in a commercially reasonable manner, Riddell would have recovered value after the bank satisfied its debt. The bank counters that Riddell received notice and, moreover, had actual knowledge of the bank's intent to dispose of its collateral.

Riddell's complaint raises non-core matters. 28 U.S.C. § 157. The parties consent to the entry of a final order or judgment by this court. 28 U.S.C. § 157(c)(2).

Summary judgment is proper if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, and other matters presented to the court show that there is no genuine issue of material fact and that the moving party is entitled to a judgment as a matter of law. Celotex Corp. v. Catrett, 477 U.S. 317, 322-23 (1986); Anderson v. Liberty Lobby Inc., 477 U.S. 242, 250 (1986); Washington v. Armstrong World Indus., 839 F.2d 1121, 1122 (5th Cir. 1988). On a summary judgment motion the inferences to be drawn from the underlying facts must be viewed in the light most

favorable to the party opposing the motion. Anderson, 477 U.S. at 255. A factual dispute bars summary judgment only when the disputed fact is determinative under governing law. Anderson, 477 U.S. at 250.

The movant bears the initial burden of articulating the basis for its motion and identifying evidence which shows that there is no genuine issue of material fact. Celotex, 477 U.S. at 322. The respondent may not rest on the mere allegations or denials in its pleadings but must set forth specific facts showing that there is a genuine issue for trial. Matsushita Electric Indus. Co., Ltd. v. Zenith Radio Corp., 475 U.S. 574, 587 (1986). The court applies the same standards to the cross-motion for partial summary judgment.

The debtor, James Riley Davis, owned two aircraft, a 1990 Air Tractor AT402, serial #402-0757, and a 1989 Air Tractor AT402-A, serial #402A-0738. The parties agree that the bank held a perfected first lien on the aircraft. Davis delivered bills of sale for the aircraft to Riddell in January 2000. Riddell did not file the bills of sale with the Federal Aviation Administration. On January 10, 2000, Davis delivered possession of the 1989 aircraft to Riddell.

On June 9, 2000, Davis filed a petition for relief under Chapter 11 of the Bankruptcy Code. On June 22, 2000, Davis filed a motion to sell the aircraft. The bank would be paid

from the proceeds of the sale. Riddell filed an objection to the sale, alleging that the aircraft were not property of the estate but, instead, had been conveyed to Riddell. The parties resolved the objection by agreeing that the proceeds of the sale would be deposited in the registry of the court, pending resolution of Riddell's claim of an ownership interest in the aircraft. The sale did not take place.

On August 17, 2000, the bank filed a motion to lift the automatic stay to pursue its non-bankruptcy law remedies. In that motion the Bank requested:

> that this Court enter an Order lifting the automatic stay to permit FIRST BANK OF WEST TEXAS to repossess the collateral; that FIRST BANK OF WEST TEXAS be permitted to sell the 1990 Air tractor AT402, Serial #402-0757, Registration N-4523L, and 1989 Air tractor AT402A, Serial #402A-0738, Registration N-10189 and apply the proceeds to the balance remaining due by Debtor; and that the Court grant such other and further relief as is just and proper.

Mot. by First Bank of West Texas for Relief of Automatic Stay at 3. The bank served the motion on Riddell's attorney. Riddell did not file an objection or other response to the motion. On September 1, 2000, the court entered an order providing:

> ORDERED that the automatic stay shall remain in effect until September 25, 2000 at 5:00 p.m. On September 25, 2000 at 5:00 the automatic stay shall automatically be terminated without further Order of this Court to allow First Bank West Texas to exercise all lawful state and federal remedies to repossess and sell the following:

1990 Air tractor AT402, Serial #402-0757,
Registration N-4523L, and
1989 Air tractor AT402A, Serial #402A-0738,
Registration N-10189.

The order was served on Riddell's attorney.

In the intervening days, Davis still could not sell the aircraft. Consequently, the stay lifted on September 25, 2000, allowing the bank to pursue its state and federal remedies.

Davis delivered possession of one plane to the bank. The bank had to obtain possession of the other plane from Riddell. The bank did not file a notice of repossession with the FAA until March 2002.

On November 2, 2000, Riddell filed the instant adversary proceeding against the bank and Davis, seeking to enjoin the sale of the aircraft. Riddell did not serve the complaint on the bank until February 17, 2001. Hardy Aviation Insurance, Inc., intervened to protect a second lien position. Riddell withdrew its injunction request.

On March 26, 2001, the bank sold the aircraft at a private sale for $175,000 and $110,000 respectively.

Riddell's ownership interest

Riddell asserts that by virtue of the bills of sale executed by Davis and the delivery of one of the aircraft, Riddell held an ownership interest in the aircraft. At the hearing on the cross-motions for summary judgment, the parties agreed that the issue of Riddell's ownership interest presented genuine issues of

material fact, thereby precluding summary judgment, and requiring a trial. For purposes of this decision, the court assumes that Riddell will establish an interest in the aircraft at trial.

The bank's liens

The parties agree that the bank held a perfected first lien on both aircraft. The parties agree that the bank's liens had to be paid before Riddell could realize value from the aircraft, assuming it held an interest in the aircraft.

Notice of the private sale

Riddell asserts that the bank did not provide notice of the private sale of the aircraft to Riddell. The bank contends that Riddell was not entitled to notice, but, if Riddell was entitled to notice, then Riddell received notice and, in fact, knew that the bank intended to sell the aircraft.

Under Texas law, a secured creditor after default may sell its collateral. Tex. Bus. & Com. Code § 9.504(a). "Disposition of the collateral may be by public or private proceedings and may be made by way of one or more contracts. . . .but every aspect of the disposition . . .must be commercially reasonable." Tex. Bus. & Com. Code § 9.504(c). If by private sale, "reasonable notification of the time after which any private sale . . .is to be made shall be sent by the secured party to the debtor, if he has not signed after default a statement renouncing or modifying his right to notification of sale." Id. In addition,

"notification shall be sent to any other secured party who has a security interest in the same collateral . . .from whom the secured party has received (before sending his notification to the debtor or before the debtor's renunciation of his rights) written notice of a claim of an interest in the collateral." Id.

There is no genuine issue of material fact that the bank did not send notification to Riddell of the time after which any private sale was to be made.

The bank asserts that Riddell has no ownership interest in the aircraft and does not assert a secured creditor position in the aircraft. As stated above, the ownership issue is reserved for trial. Assuming Riddell establishes an ownership interest at trial, the bank nevertheless contends that Riddell is not entitled to notice under the statute. The bank contends that the statute applies to the "debtor" and "any other secured party." The bank argues that Riddell is neither the debtor nor a secured party.

Section 9.105(a)(4) of the Texas Business and Commerce Code provides that:

> "Debtor" means the person who owes payment or other performance of the obligation secured, whether or not he owns or has rights in the collateral, and includes the seller of accounts or chattel paper. Where the debtor and the owner of the collateral are not the same person, the term "debtor" means the owner of the collateral in any provision of the chapter dealing with the collateral, the obligor in any provision dealing with the obligation, and may include both where the context so requires.

Therefore, if Riddell is found to be the owner of the two aircraft, then it is also considered to be the "debtor" for purposes of § 9.504(c). See also 66 Tex. Jur. 3d Secured Transactions § 7 (2001). Furthermore, Riddell, as the "debtor," did not renounce its rights, as evidenced by its filing a complaint claiming interest in the aircraft and objecting to the sale of the aircraft by Davis. In accordance with this definition, Riddell, as the "debtor," was entitled to notification from the bank. Tex. Bus. & Com. Code § 9.504(c).

For a secured party, § 9.504 requires written notice to the bank of the claim of the other secured party. Logically, the same requirement must apply to a person claiming an ownership interest from the debtor. Riddell did not file the bills of sale with the FAA. Riddell argues that the automatic stay enjoined it from filing the bills of sale. But, Riddell did file an objection to the debtor's motion to sell the aircraft and Riddell did file and serve, before the sale, the instant complaint. Both written pleadings alleged that Riddell held an ownership interest in the aircraft. There is, therefore, no genuine issue of material fact that the bank knew, before the private sale of the aircraft, that Riddell claimed an ownership interest in the aircraft.

The bank argues nevertheless that Davis, the debtor, renounced his rights to notice before Riddell provided the bank

with written notice of its ownership claim. The bank contends that Davis' agreement to the entry of the order lifting the stay amounts to a renunciation of his state law rights. However, authorizing an attorney to agree to First Bank's motion for relief from the automatic stay does not serve as a renunciation of rights by the debtor. Rather, the act is merely an acquiescence to remove the bankruptcy impediment to the creditor from utilizing the legal rights to which it was entitled.

The order, quoted above, merely lifts the stay if Davis had not sold the aircraft by September 25, 2000, allowing the bank to pursue its state and federal remedies. The order neither incorporates nor adopts a stipulation by Davis renouncing his rights under state law. The order merely removes the bankruptcy injunction against the bank from pursuing those remedies, whatever they may be and however they may be enforced.

The bank then argues that Riddell actually knew that the bank intended to foreclose on its liens. The bank served its motion to lift the automatic stay on Riddell's counsel. Riddell did not oppose the motion. The order providing that the stay would lift effective September 25, 2000, was served on Riddell's counsel. After the stay lifted and prior to the sales, Riddell filed the instant adversary proceeding, initially seeking to enjoin any sale of the aircraft by the bank. There is,

consequently, no genuine issue of material fact that Riddell knew that the bank sought to dispose of its collateral.

But, that fact merely begs the question. Riddell asserts that it was nevertheless entitled to the notification of the date after which the bank could pursue a private sale. With that notice, Riddell could protect its claim of an interest in the property. Without the notice, the bank might convert Riddell's interest in the property, without providing Riddell an opportunity to protect its interest. Riddell argues that it did not oppose the stay relief and ultimately determined not to pursue an injunction because it ultimately did not oppose acts by the bank to satisfy its liens. Riddell chose, instead, to rely on notice of a sale to protect its interest. The court agrees with Riddell's position. Knowledge of a secured creditor's desire to dispose of its collateral does not equate to notice of a public or private sale of the collateral under state law sufficient to protect an interest in property.

Under the Texas Business and Commerce Code, a secured party is only required in the notification to state the time after which a private sale may occur. § 9.504(c). Accordingly, First Bank was required to simply provide this general notification and not the more specific and detailed notification required for a public sale. Id. "[A]t a minimum [the notification] must be sent in such time that persons entitled to receive it will have

sufficient time to take appropriate steps to protect their interests . . ." Fed. Deposit Ins. Corp. v. Lanier, 926 F.2d 462, 465 (5th Cir. 1991)(quoting § 9.504, cmt. 5).

The doctrine of providing notice to all interested parties is an integral element of due process and provides concerned parties with the opportunity to be heard. Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306, 313-14 (1950) (citing Grannis v. Ordean, 234 U.S. 385, 394 (1914)). Specifically, the debtor or secured party must be provided with sufficient time to take appropriate measures to protect their interest by taking part in the sale or disposition. FDIC, 926 F.2d at 464; Knights of Columbus Credit Union v. Stock, 814 S.W.2d 427, 430 (Tex. App.--Dallas 1991, writ denied). These "appropriate measures" include the opportunity to discharge the debt, arrange for a friendly purchase, or to oversee the sale to ensure it is conducted in a commercially reasonable manner. SMS Fin. Ltd. Liab. v. ABCO Homes, Inc., 167 F.3d 235, 242 (5th Cir. 1999); FDIC, 926 F.2d at 464 (citing 2 J. White & R. Summers, Uniform Commercial Code § 27-12 at 598-99 (3d ed. 1988)). To promote this purpose, for a private sale, the secured party must expressly notify an owner of collateral of the time after which a private sale can occur.

A court order granting relief from the stay does not serve as notification of a time after which the bank could hold a

private sale of collateral, as argued by First Bank. The order merely lifts barriers to the potential action a secured party is allowed to take, thereby allowing it to exercise "all lawful state and federal remedies to repossess and sell" collateral. Although the automatic stay ordinarily prevents a sale from occurring, a lift stay order neither serves as an actual notification of a sale nor reflects the party's specific intent to sell the property. Instead, the lift stay order simply opens the possibility of different remedies. In keeping with the purpose of the notification requirement, the secured party must provide notice of its specific intent to dispose of the collateral, as well as an indication of the time after which a private sale may take place. FDIC, 926 F.2d at 465.

Conversion

Riddell contends that without notice and an opportunity to protect its interest in the aircraft, the bank converted Riddell's interest. Assuming Riddell establishes an interest in the aircraft at trial, the bank cannot deprive Riddell of its interest or appropriate that interest. Wasaith v. Lack's Store, Inc., 474 S.W.2d 444, 447 (Tex. 1971) (noting "the unauthorized and wrongful assumption and exercise of dominion and control over the personal property of another, to the exclusion of or inconsistent with the owner's rights, is in law a conversion."). A secured creditor does not convert the ownership interest of a

person by foreclosing on its liens consistent with state law. Conversely, if the bank did not comply with § 9.504(c), it would have converted Riddell's interest, entitling Riddell to recovery, if damaged. The conversion claim cannot be resolved on summary judgment.

Damages

The parties agree that if the bank sold the aircraft in a commercially reasonable manner, Riddell suffered no damages. The parties further agree that there are genuine issues of material fact concerning the manner of the sale of the aircraft requiring trial.

Due Process

Riddell also alleges that if § 9.504(c) does not compel the bank to provide notice of the private sale to Riddell, then the bank becomes a state actor, depriving Riddell of an interest in property without due process. The statute, however, does require that the bank provide notification to Riddell, assuming Riddell holds an interest in the aircraft. By failing to provide that notification, the bank violates the statute. But, by doing so, the bank does not become a "state actor." The procedural scheme created by the statute complies with due process requirements. See Lugar v. Edmondson Oil Co., Inc., 457 U.S. 922, 940-41 (1982). This is not a situation where the statute relieves the bank from providing notification of a sale to a person claiming

an ownership interest in property. Accordingly, the due process claim must be dismissed.

Order

Based on the foregoing,

IT IS ORDERED that the motion for summary judgment of First Bank of West Texas is **GRANTED IN PART** and **DENIED IN PART.**

IT IS FURTHER ORDERED that the motion for summary judgment of Riddell Flying Service, Inc., is **GRANTED IN PART** and **DENIED IN PART.**

IT IS FURTHER ORDERED that:

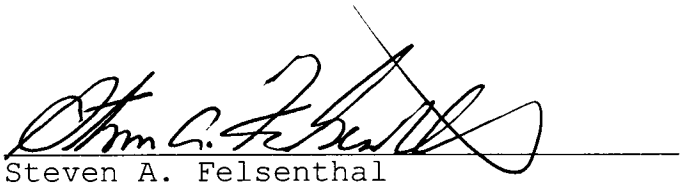
1. Riddell Flying Service, Inc.'s, cause of action based on a violation of due process is **DISMISSED.**

2. Riddell Flying Service, Inc., shall have a partial summary judgment declaring that First Bank of West Texas had notice that Riddell Flying Service, Inc., claimed an interest in the aircraft. First Bank of West Texas shall have a partial summary judgment declaring that Riddell Flying Service knew that the bank desired to sell its collateral and that the bank obtained relief from the automatic stay to allow the bank to pursue its state law remedies.

3. Riddell Flying Service, Inc., shall have a partial summary judgment declaring that it did not receive the notice of private sale of the aircraft provided by Tex. Bus. & Com. Code § 9.504(c).

4. All other issues are reserved for trial.

Signed this 23rd day of July, 2002.



Steven A. Felsenthal
United States Bankruptcy Judge