

IN THE UNITED STATES BANKRUPTCY COURT  
FOR THE SOUTHERN DISTRICT OF ILLINOIS

IN RE: ) In Proceedings  
) Under Chapter 11  
SALEM ENERGY SUPPLIES & )  
SERVICES, INC., ) No. BK 87-30509  
)  
Debtor. )

MEMORANDUM AND ORDER

Robert Miller, judgment lien creditor of debtor, Salem Energy Supplies and Services, Inc., seeks clarification and enforcement of an order entered by this Court regarding an asset of debtor's estate. This asset, referred to as a Certificate of Participation in a Class VII Master Note of the Ego Oil Company, Inc. (Ego Oil), was obtained by debtor in May 1984 pursuant to a plan of reorganization in Ego Oil's previous Chapter 11 bankruptcy proceedings

On May 29, 1987, debtor filed its Chapter 11 petition in bankruptcy. At that time a suit was pending in Marion County Circuit Court to determine priority of liens held by plaintiff and Salem National Bank (Bank), respectively, in the certificate of participation here at issue. The Bank's interest in the certificate of participation stemmed from its perfected security interest in debtor's accounts receivable, which were represented as to Ego Oil by the certificate of participation. Plaintiff's claim to the certificate of participation arose from his judgment lien on debtor's personal property, which had been perfected both by delivery of a certified copy of the judgment to the sheriff for service on debtor (see Ill.Rev.Stat. , ch. 110, ¶12-111) and by

commencement of a citations proceeding against debtor (see Ill.Rev.Stat., ch. 110, ¶2-1402).

On October 15, 1987, this Court granted relief from stay so that the issue of priority between the parties' liens could be determined in the Marion County proceeding. The Court additionally provided that, following determination of the priority of liens by the Marion County court, the certificate of participation would be sold by sealed bids.

On November 9, 1987, the Marion County Circuit Court entered judgment finding that plaintiff had a priority lien as to the certificate of participation at issue. Applying the provisions of the Uniform Commercial Code, the court observed that the certificate of participation represented "proceeds" from debtor's accounts receivable covered by the Bank's security interest, which had been perfected by filing. The court found, however, that the certificate of participation was an "instrument" in which a security interest must be perfected by possession (see Ill.Rev.Stat., ch. 26, ¶¶9-105(i), 9-304(1)) and that, in order to continue its security interest in the instrument as proceeds, it was necessary for the Bank to take possession of the certificate of participation within ten days, which the Bank had failed to do (see Ill.Rev.Stat., ch. 26, 19-306(3)). The court specifically found that §9-306(3)(b) providing for continued perfection of identifiable cash proceeds was not applicable since the certificate of participation was the like" (see Ill.Rev.Stat., ch. 26, ¶9-306(i)). Based on the Bank's failure to perfect its security interest in the certificate of participation as proceeds, the court ruled that plaintiff had priority over the Bank's interest by reason of

his judgment lien covering debtor's tangible and intangible property.

By agreement between debtor and the Bank, payments made on the certificate of participation from September to December 1987 were placed in a separate cash collateral account at the Bank. Additional payments in January and February 1988 were made to Wayne Krehbiel as custodian of the Ego Oil master note.

At a sale conducted by this Court on February 16, 1988, plaintiff purchased the certificate of participation by offsetting the amount of his bid against the total amount owed him by debtor. Plaintiff subsequently filed the instant motion for clarification and enforcement, seeking to recover the payments made on the certificate of participation from September 1987 to February 1988 that are presently held by the Bank and by Wayne Krehbiel. It is plaintiff's position that his judgment lien, which was adjudicated to be paramount to the Bank's security interest, gave him a prior right not only to the certificate of participation but also to the interim payments made on the certificate of participation pending the Marion County court's judgment. Plaintiff requests, therefore, that the Court's order of October 15, 1987, providing for determination of priority of liens by the Marion County court be clarified accordingly.

At hearing on plaintiff's motion, argument was made on behalf of debtor and Jack Kuykendall, successor to the Bank's interest, that the certificate of participation did in fact constitute cash proceeds of debtor's accounts receivable and that the Bank thus had a prior right to the certificate and the payments thereon by reason of the Bank's perfected security interest in debtor's accounts receivable. Counsel

for debtor and Jack Kuykendall acknowledged that this issue had been litigated in the Marion County action to which the Bank was a party and conceded that, if the Marion County judgment "were considered binding" on this Court, plaintiff would be entitled to the payments at issue that were made on the certificate of participation.

The doctrine of collateral estoppel prevents parties from relitigating issues actually and necessarily litigated in a prior proceeding. See In re Freeman, 68 B.R. 904 (Bankr. M.D. Pa. 1987). In the instant case, debtor and Jack Kuykendall seek to relitigate in this Court the issue of priority of liens in the certificate of participation that was previously litigated and decided in the Marion County action. Indeed, stay was lifted in this Court so that the state court action could proceed to a determination of the matter now raised by debtor and the Bank's successor in interest. The Marion County court expressly found that the certificate of participation did not constitute cash proceeds of debtor's accounts receivable so as to be subject to the Bank's security interest. Thus, debtor and Jack Kuykendall are estopped from seeking another determination of the issue in this Court.

Since, under the state court's ruling, plaintiff had a superior right to the certificate of participation based on his perfected judgment lien on debtor's property, plaintiff likewise has a superior right to the payments made on the certificate prior to its sale. These payments constitute proceeds of the certificate and are subject to the same liens as the original property. See Application of Tazewell County Collector, 130 Ill. App. 3d 77, 473 N.E. 2d 1013 (1985);

Marshall Savings & Loan Association v. Chicago National Bank, 56 Ill. App. 2d 372, 206 N.E. 2d 117 (1965); Ill L. & Prac., Liens, §5, at 164 (1956). Prior to sale of the certificate of participation in February 1988, debtor, as owner of the certificate of participation, received the payments made on the certificate. These payments, however, were subject to plaintiff's judgment lien, and plaintiff may claim these payments to satisfy the indebtedness owing to him by debtor.

The Court finds, therefore, that the Marion County judgment establishing plaintiff's lien as a first and paramount lien on the certificate of participation applies to the proceeds thereof and that the payments held by the Bank and by Wayne Krehbiel should be paid to plaintiff. Plaintiff's judgment lien against debtor will be reduced in the amount of these payments.

IT IS SO ORDERED.

\_\_\_\_\_ /s/ Kenneth J. Meyers  
U.S. BANKRUPTCY JUDGE

ENTERED: October 28, 1988