

**UNITED STATES BANKRUPTCY COURT
MIDDLE DISTRICT OF FLORIDA
JACKSONVILLE DIVISION**

In re:

Case No. 3:13-bk-03943-PMG
And 3:13-bk-03944-PMG

KOON'S FARMS, INC.,

Jointly Administered

Debtor.

Chapter 12

ORDER DETERMINING PRIORITY OF LIENS

THIS CASE came before the Court for a final evidentiary hearing to determine the priority of liens in this Chapter 12 case. The Debtors are farmers, and four separate creditors have asserted security interests in their 2013 crop proceeds.

This is the Debtors' second Chapter 12 case. Their first case was dismissed pursuant to the Debtors' motion for dismissal under §1208 of the Bankruptcy Code.

The dismissal of a bankruptcy case generally reinstates liens that were avoided under §506(d) of the Bankruptcy Code, and vacates orders that were entered under §522(i)(1), §542, §550, and §553 of the Bankruptcy Code. 11 U.S.C. §349(b).

In this case, an Order confirming the Debtors' Chapter 12 Plan was entered in their first case. The confirmed Plan provided that prepetition crop liens were voided pursuant to §552(a) of the Bankruptcy Code, and that the Debtors were authorized to obtain post-confirmation financing for their 2013 crops in accordance with §364 of the Bankruptcy Code. These provisions remained valid after dismissal of the case, because (1) actions taken pursuant to §552 and §364 are not listed in §349(b) as events that are

affected by the dismissal of a case, and because (2) the post-confirmation lenders acquired rights in the Debtors' 2013 crop proceeds in reliance on the Confirmation Order.

Accordingly, Crop Production Services, Inc. holds a first priority lien on the Debtors' 2013 crop proceeds, and Drummond Community Bank holds a second priority lien on the Debtors' 2013 crop proceeds, pursuant to the Confirmation Order and their post-confirmation loan documents. Lafayette State Bank and Mayo Fertilizer, Inc. do not hold perfected security interests in the 2013 crop proceeds, because their liens on post-confirmation crops were voided by virtue of the Confirmation Order and §552(a) of the Bankruptcy Code.

Background

The Debtors operate a farm near Mayo, Florida, for the planting and harvesting of cotton, soybeans, corn, wheat, peanuts, oats, and other crops.

On January 18, 2012, the Debtors filed their first petition under Chapter 12 of the Bankruptcy Code.

On the date that the first petition was filed, Lafayette State Bank (Lafayette) was a secured creditor of the Debtors in the approximate amount of \$2,341,636.72. According to Lafayette's Proof of Claim, the debt was secured by "equipment and crops." (Case No. 12-275, Claim No. 30-1).

On the date that the first petition was filed, Mayo Fertilizer, Inc. (Mayo) was also a secured creditor of the Debtors in the approximate amount of \$605,149.38. According to Mayo's Proofs of Claim, the debt was secured by crops and farm products. (Case No. 12-275, Claim Nos. 35-1, 36-1).

On January 20, 2012, the Debtors filed an Emergency Motion to Use Cash Collateral and to Obtain Credit Secured by a Lien on Property of the Estate. (Case No. 12-275, Doc. 5). In the Motion, the

Debtors alleged that various creditors, including Lafayette and Mayo, had asserted competing liens against the proceeds of their 2011 crops, and requested authorization to use the 2011 crop proceeds for the production of their crops for the 2012 crop year.

On March 27, 2012, the Debtors filed a Joint Motion to compromise the dispute regarding the 2011 crop proceeds. (Case No. 12-275, Doc. 54). Pursuant to the proposed compromise, an entity known as Rabo Agrifinance, Inc. held a first priority security interest in the 2011 crop proceeds, Mayo held a second priority security interest in the 2011 crop proceeds, and Lafayette's interests were not secured by the proceeds of the 2011 crops.

The Joint Motion to Approve Compromise was granted on April 23, 2012. (Case No. 12-275, Doc. 61).

While the dispute regarding the 2011 crop proceeds was pending, the Debtors filed a Motion to Obtain Post-Petition Secured Financing Pursuant to §364 of the Bankruptcy Code. (Case No. 12-275, Doc. 50). In the Motion, the Debtors asked for permission to obtain financing for the production of their 2012 crops.

The Court granted the Motion, and the Order authorizing the Debtors to obtain post-petition financing included the following terms:

1. The Debtors were authorized to obtain post-petition secured financing from Crop Production Services, Inc. (CPS), as the "Senior 2012 Crop Lender," for a \$700,000.00 line of credit "to purchase chemicals and fertilizer for the Collateral." CPS was to have a first priority security interest in the crops harvested, marketed, and sold by the Debtors in 2012.

2. The Debtors were authorized to obtain post-petition secured financing from Drummond Community Bank (Drummond), as the "Junior 2012 Crop Lender," for a \$550,000.00 line of credit "to purchase chemicals and fertilizer" for the Debtors' 2012

crop season. Drummond was to have a second priority security interest in the “Debtors’ 2012 corn, oats, soybeans and peanut crops.”

The Order further provided that its terms shall not be construed to modify or affect the compromise reached by the Debtors, Rabo, Mayo, and Lafayette regarding the 2011 crop proceeds. (Case No. 12-275, Doc. 58).

On May 18, 2012, the Debtors filed their Third Amended Jointly Administered Chapter 12 Plan. (Case No. 12-275, Doc. 72). Section E of the Third Amended Plan is entitled “Provisions Relating to Post-Confirmation Crop Financing,” and includes the following terms:

2. “All pre-petition security interests, liens and UCC-1 Financing Statements recorded prior to January 18, 2012, in any and all crops, crop proceeds and agricultural products not otherwise disposed of in accordance with the Debtors’ Joint Motion to Approve Compromise of Controversy dated March 27, 2012 [Docket No. 54] are deemed canceled, released, vacated and void in accordance with §552(a), United States Bankruptcy Code, which provides in relevant part applicable to this Chapter 12 Plan ‘property acquired by the estate or by the debtor after the commencement of the case is not subject to any lien resulting from any security agreement entered into by the debtor before the commencement of the case.’”

...

3. “In accordance with the provisions of §364, United States Bankruptcy Code, the Debtors are empowered and authorized to obtain post-confirmation crop financing for the 2013 (after December 31, 2012) crop year and grant a senior, first priority security interest to a crop lender (the ‘Senior Crop Lender’) in accordance with and governed by the following terms and conditions.”

(Emphasis supplied). An Amended Order confirming the Plan was entered on June 29, 2012. (Case No. 12-275, Doc. 103). The Amended Order provided (1) that the Third Amended Plan dated May 18, 2012, was confirmed, (2) that secured creditors shall retain their liens, (3) that property of the estate reverted in the Debtors subject to creditors’ liens to the extent of the value of the property, and (4) that the Debtors were authorized to incur post-confirmation secured financing in accordance with the Order

Authorizing the Debtors to Obtain Post-Petition Secured Financing and the terms of the Plan. (Case No. 12-275, Doc. 103, ¶¶ 1, 7, 10, 18, 21).

On March 7, 2013, after the Plan was confirmed, the Debtors executed a Promissory Note and Commercial Security Agreement in favor of Drummond Community Bank. Pursuant to the Note and Security Agreement, the Debtors borrowed the sum of \$330,791.27 from Drummond, and the loan was secured by collateral that included “all corn, oats, soybeans, sorghum, wheat, grass seed, pine straw, and peanut crops planted, cultivated, grown, produced, harvested, and marketed and sold in 2013.” A Financing Statement was filed in the Florida Secured Transaction Registry on March 18, 2013. (Exhibits DCB-1, DCB-2, DCB-3).

On March 11, 2013, the Debtors executed a Line of Credit Promissory Note and Security Agreement in favor of Crop Production Services, Inc. Pursuant to the Note and Security Agreement, CPS extended a line of credit to the Debtors in the maximum principal amount of \$690,000.00, with a maturity date of December 5, 2013. The Note provided that the proceeds of the line of credit would be used “only for the purchase by the Debtor of seed, chemicals and fertilizer from Lender to be utilized by the Debtor in connection with production of the crops described as part of the ‘Collateral’ in the Security Agreement.” In the Security Agreement, the term “collateral” included “all corn, oats, wheat, soybeans and peanut crops now or hereafter planted, cultivated, grown, produced, harvested, marketed and sold by or on behalf of the Debtors,” together with the proceeds of the crops. A Financing Statement was filed in the Florida Secured Transaction Registry and in Lafayette County, Florida on April 10, 2013. (Exhibits CPS-9, CPS-10, CPS-11, CPS-12).

On May 26, 2013, the Debtors filed a Motion for Dismissal of Chapter 12 Case pursuant to §1208 of the Bankruptcy Code. (Case No. 12- 275, Doc. 144).

On May 30, 2013, the Court entered an Order dismissing the Debtor's first Chapter 12 case. (Case No. 12-275, Doc. 145).

On June 26, 2013, the Debtors filed their second petition under Chapter 12 of the Bankruptcy Code. (Doc. 1).

On July 9, 2013, the Debtors filed an Amended Motion to Allow Use of Cash Collateral in their second case. (Doc. 22). In the Motion, the Debtors request authorization to use the proceeds of their 2013 crop to pay their post-petition contractual and tax obligations.

Discussion

According to the Motion, four creditors may assert liens on the Debtors' 2013 crop proceeds. The creditors are Crop Production Services, Inc. (CPS), Drummond State Bank (Drummond), Mayo Fertilizer, Inc. (Mayo), and Lafayette State Bank (Lafayette). A final evidentiary hearing was conducted for the purpose of determining the relative priorities of the creditors' liens on the 2013 crops and crop proceeds.

Mayo and Lafayette both assert that their liens were created pursuant to the security interests that they acquired prior to the filing of the Debtors' first Chapter 12 case on January 18, 2012. (Doc. 129, p. 7; Doc. 130, p. 3).

CPS and Drummond both assert that their liens were created pursuant to the Confirmation Order that was entered in the Debtors' first Chapter 12 case, and the loans that they extended following the entry of the Confirmation Order. (Doc. 127, p. 2; Doc. 131, p. 2).

The Debtors' first case was dismissed on May 30, 2013. (Case No. 12-275, Doc. 145).

Section 349(b) of the Bankruptcy Code provides:

11 USC §349. Effect of dismissal

...

(b) Unless the court, for cause, orders otherwise, a dismissal of a case other than under section 742 of this title—

(1) reinstates—

(A) any proceeding or custodianship superseded under section 543 of this title;

(B) any transfer avoided under section 522, 544, 545, 547, 548, 549, or 724(a) of this title, or preserved under section 510(c)(2), 522(i)(2), or 551 of this title; and

(C) any lien voided under section 506(d) of this title;

(2) vacates any order, judgment, or transfer ordered, under section 522(i)(1), 542, 550, or 553 of this title.

11 U.S.C. §349(b)(Emphasis supplied). Under this section, the dismissal of a bankruptcy case operates to reverse certain events that transpired while the case was pending. In re TNT Farms, 226 B.R. 436, 441 (Bankr. D. Idaho 1998). A dismissal reinstates liens that were voided under certain provisions of the Bankruptcy Code, for example, and vacates certain types of orders that were entered in the case. In re Wiese, 552 F.3d 584, 587 (7th Cir. 2009).

A. The provisions of the Confirmation Order relating to crop liens were not affected by the dismissal of the first case.

In this case, the Debtors' confirmed Plan voided the prepetition crop liens of Mayo and Lafayette, and authorized the post-confirmation crop liens of CPS and Drummond. These provisions of the

confirmed Plan were not affected by the subsequent dismissal of the case pursuant to §349(b) of the Bankruptcy Code.

The Debtors' Third Amended Chapter 12 Plan was confirmed by the Amended Order entered on June 29, 2012 (the Confirmation Order). (Case No. 12-275, Doc. 103). The Plan provided that crop liens recorded prior to the filing of the first case were canceled and voided "in accordance with §552(a)" of the Bankruptcy Code. The Plan also provided that the Debtors were authorized to obtain post-confirmation financing for their 2013 crops "in accordance with the provisions of §364" of the Bankruptcy Code. (Case No. 12-275, Doc. 72).

No motion for rehearing or appeal of the Confirmation Order was filed, and the provisions of the confirmed Plan therefore bound the Debtors and all creditors pursuant to §1227(a) of the Bankruptcy Code.

The provisions of the confirmed Plan that relate to crop liens are based on §552(a) and §364 of the Bankruptcy Code. Actions taken pursuant to §552(a) and §364 are not included among the events and orders that are affected by the dismissal of a case under §349(b).

Generally, the omission of §552(a) and §364 from the language of §349(b) may be viewed as reflecting legislative intent to leave orders entered pursuant to those sections unaffected by the dismissal of the underlying case. See In re TNT Farms, 226 B.R. at 442. See also In re JGC Enterprises, LLC, 2002 WL 1378883, at 2 (9th Cir.)(Section 349 refers to the specific sections affected by dismissal, and the omission of a section ordinarily means that dismissal does not affect an order entered pursuant to that section); In re Parrish, 275 B.R. 424, 427 (Bankr. D.D.C. 2002)(Chapter 13 confirmation orders are not among the orders vacated by dismissal under §349(b)(2)); and In re Lopez

Development, Inc., 154 B.R. 607, 610 (Bankr. S.D. Fla. 1993)(Courts generally do not extend the effect of §349(b) beyond the expressly enumerated provisions.).

Because actions taken pursuant to §552 and §364 are not listed in §349(b) as events that are affected by the dismissal of a case, the provisions of the Confirmation Order that are “in accordance with” §552 and §364 remained valid after dismissal of the Debtors’ first Chapter 12 case.

In fact, Lafayette appears to acknowledge that dismissal of the first case did not vacate the Confirmation Order pursuant to §349(b). Lafayette contends, however, that the Order Confirming Plan provides that “secured creditors shall retain their liens,” and that this provision operates to preserve Lafayette’s crop liens after confirmation. (Transcript, Vol. II, pp. 195-96). The Court has considered the Debtors’ Third Amended Plan, and finds that the liens retained post-confirmation do not include the prepetition crop liens asserted by Lafayette and Mayo.

The Plan designates fifty-one secured claims, including a number of vehicle and equipment liens that the Debtors proposed to pay in installments until the claims were satisfied. (Case No. 12-275, Doc. 72, pp. 2-11). Section E.2 of the Plan, on the other hand, specifically relates to post-confirmation crop financing, and provides for (1) the avoidance of all security interests in crop proceeds that were recorded before the petition, and (2) the granting of new crop liens for the 2013 crop year. Based on the confirmed Plan in its entirety, therefore, it appears that the lien-retention provisions apply to liens other than crop liens, such as vehicle and equipment liens, and that the specific crop-financing provisions apply to the crop liens asserted by CPS, Drummond, Lafayette, and Mayo.

The actions taken under the crop-financing provisions are not listed in §349(b) as events that are affected by the dismissal of a case, and therefore remained valid after the Debtors' first Chapter 12 case was dismissed on May 30, 2013.

B. The post-confirmation lenders acquired rights in the 2013 crop proceeds in reliance on the Confirmation Order.

Additionally, if “cause” is shown under §349(b), a Court may determine that the dismissal of a case does not reverse the specified events that occurred while the case was pending. The term “cause” in this context “is usually geared toward protecting rights acquired in reliance upon the bankruptcy.” In re Wiese, 552 F.3d at 587.

After noting that the broad purpose of §349 is to return the parties to their prebankruptcy status, for example, the legislative history to the section provides:

The court is permitted to order a different result for cause. The basic purpose of the subsection is to undo the bankruptcy case, as far as practicable, and to restore all property rights to the position in which they were found at the commencement of the case. This does not necessarily encompass undoing sales of property from the estate to a good faith purchaser.

Where there is a question over the scope of the subsection, the court will make the appropriate orders to protect rights acquired in reliance on the bankruptcy case.

HR Rep. 95-595, 95th Cong, 1st Sess 338 (1977); S Rep. No, 989, 95th Cong, 2d Sess 48-49 (1978)(Emphasis supplied)(quoted in In re Lopez Development, Inc., 154 B.R. at 610). In determining the effect of a dismissal under this guideline, it is appropriate to consider the interests of creditors who have changed their position based on a Court order. In re Wiese, 552 F.3d at 590.

The authority of a court to determine “cause” under §349(b) is consistent with the policy of protecting parties who finance a debtor’s operations under §364 of the Bankruptcy Code. Section 364

governs the ability of a debtor to obtain post-petition credit. Section 364(c) permits a debtor to obtain credit that is secured by property of the estate, after notice and hearing and following Court approval.

11 U.S.C. §364(c). Section 364(e) provides:

11 USC §364. Obtaining credit

...

(e) The reversal or modification on appeal of an authorization under this section to obtain credit or incur debt, or of a grant under this section of a priority or a lien, does not affect the validity of any debt so incurred, or any priority or lien so granted, to an entity that extended such credit in good faith, whether or not such entity knew of the pendency of the appeal, unless such authorization and the incurring of such debt, or the granting of such priority or lien, were stayed pending appeal.

11 U.S.C. §364(e). “The purpose of this provision is to encourage lenders to extend credit to debtors in bankruptcy by eliminating the risk that any lien securing the loan will be modified on appeal.” In re Foreside Management Co., LLC, 402 B.R. 446, 451 (1st Cir. BAP 2009)(citing In re Saybrook Mfg. Co., 963 F.2d 1490, 1493 (11th Cir. 1992)).

In this case, the Debtors’ confirmed Plan authorized the Debtors to obtain post-confirmation financing for their 2013 crops, and to “grant a senior, first priority security interest to a crop lender” in accordance with §364 of the Bankruptcy Code. (Case No. 12-275, Docs. 72, 103). The subsequent dismissal of the case should not invalidate the post-confirmation first and second liens under §349(b).

Although 364(e) speaks only of modification on appeal, it imparts the notion that bankruptcy judges may, under appropriate circumstances, make binding commitments to give priority to new credit. This rule promotes the policy of reorganization, since if creditors fear that, after the fact, financing orders will be invalidated, lenders will be extremely hesitant to advance credit. (Citation omitted). It is the principle whereby bankruptcy judges may grant priority to new extensions of credit that makes it unpracticable to simply ignore a Section 364 lien upon dismissal of a case.

In re TNT Farms, 226 B.R. at 442(quoting Intermountain Farmers Association v. Claar, 98.3 I.B.C.R. 67, 68)(Emphasis supplied). The policy recognizes that the creditor with an approved lien under §364 should not bear the risk that the debtor's attempt to reorganize under Chapter 12 may later fail. In re TNT Farms, 226 B.R. at 442.

The Confirmation Order was entered in this case on June 29, 2012. (Case No. 12-274, Doc. 103). On March 7, 2013, while the case was still pending, Drummond extended post-confirmation financing to the Debtors in the amount of \$330,791.27. On March 11, 2013, CPS extended a post-confirmation line of credit to the Debtors in the maximum principal amount of \$690,000.00. (Exhibits DCB-1, DCB-2, DCB-4, CPS-9, CPS-10, CPS-11, CPS-12).

Greg Croft, a representative of CPS, testified at trial that the line of credit was extended to enable the Debtors to purchase seed, fertilizer, and chemicals from CPS. He also identified the invoices that documented the Debtors' purchase of the "crop inputs" from CPS in 2013 pursuant to the line of credit. (Transcript, pp. 80-92; Exhibits CPS-20, CPS-21). The Debtor, Sidney Koon, testified that the Debtors used the CPS line of credit to purchase seed for the 2013 crop year, and that the seed was planted. He also testified that the CPS line of credit was the only source of financing for the 2013 seed. (Transcript, pp. 95, 97-106).

Chan Perry, an area president for Drummond, testified that Drummond extended the loan in March of 2013 to enable the Debtors to meet their general farm operating expenses, such as expenses for fuel, insurance, electricity, and labor, and that Debtors used the loan proceeds for those purposes. (Transcript, pp. 31-32, 46-47). Perry also testified that Drummond relied on the terms of the confirmed

Plan and Confirmation Order that extinguished the liens acquired before January 18, 2012, and authorized the post-confirmation financing. (Transcript, pp. 34, 40).

Because CPS and Drummond acquired rights in the Debtors' 2013 crop proceeds in reliance on the Confirmation Order, the liens acquired in accordance with §364 should not be voided upon dismissal of the Debtors' case.

Conclusion

The Debtors are farmers, and four separate creditors have asserted security interests in their 2013 crop proceeds. A final evidentiary hearing was conducted to determine the relative priority of the liens.

This is the Debtors' second Chapter 12 case. The first case was dismissed pursuant to the Debtors' motion for dismissal under §1208 of the Bankruptcy Code.

The dismissal of a bankruptcy case generally reinstates liens that are avoided under §506(d) of the Bankruptcy Code, and vacates orders that were entered under §522(i)(1), §542, §550, §553 of the Bankruptcy Code. 11 U.S.C. §349(b).

In this case, an Order confirming the Debtors' Chapter 12 Plan was entered in their first case. The confirmed Plan provided that prepetition crop liens were voided pursuant to §552(a) of the Bankruptcy Code, and that the Debtors were authorized to obtain post-confirmation financing for their 2013 crops in accordance with §364 of the Bankruptcy Code. These provisions remained valid after dismissal of the case, because (1) actions taken pursuant to §552 and §364 are not listed in §349(b) as events that are affected by the dismissal of a case, and because (2) the post-confirmation creditors acquired rights in the Debtors' 2013 crop proceeds in reliance on the Confirmation Order.

Consequently, CPS holds a first priority lien on the Debtors' 2013 crop proceeds, and Drummond holds a second priority lien on the Debtors' 2013 crop proceeds, pursuant to the Confirmation Order and their post-confirmation loan documents. Lafayette and Mayo do not hold perfected security interests in the 2013 crop proceeds, because their liens on post-confirmation crops were voided by virtue of the Confirmation Order and §552(a) of the Bankruptcy Code.

Accordingly:

IT IS ORDERED that:

1. The Line of Credit Promissory Note and Security Agreement of Crop Production Services, Inc. dated March 11, 2013, together with the Financing Statements filed on April 10, 2013, evidence a first priority security interest in the collateral described therein.

2. The Promissory Note and Commercial Security Agreement of Drummond Community Bank dated March 7, 2013, together with the Financing Statement filed on March 18, 2013, evidence a second priority security interest in the collateral described therein.

3. The 2013 crop proceeds of the Debtors, Koon's Farms, Inc., Sidney Curtis Koon, and Julie Singletary Koon, are not subject to the liens of Lafayette State Bank and Mayo Fertilizer, Inc., that were acquired prior to January 18, 2012.

DATED this 26 day of November, 2013.

BY THE COURT

Paul M. Glenn

PAUL M. GLENN

United States Bankruptcy Judge