

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

IN RE:)
)
MARTY R. TATE,) Case No. 15-03814
)
Debtor.)

ORDER

This matter is before the Court on the debtor's motion for turnover (doc. 18) and the motion for relief from stay (doc. 23) filed by creditor Burroughs Diesel, Inc. ("Burroughs"). The Court has jurisdiction to hear this matter pursuant to 28 U.S.C. § 157 and § 1334 and the order of reference of the District Court. This is a core proceeding pursuant to 28 U.S.C. § 157(b)(2)(E) and (G).

Debtor purchased the 2010 Western Star truck which is the subject of the motions in May 2015 from Burroughs for \$66,200. Debtor listed the value of the truck at \$65,000 in Schedule B. Mercedes Benz Financial Services USA LLC ("MB Financial") financed the truck and has filed a proof of claim which includes \$65,909.94 owed on that loan as of the petition date. MB Financial's loan is secured by the truck and perfected by listing on the certificate of title.

Debtor testified that he had many problems with the truck after its purchase and that the motor eventually failed. He testified that Burroughs told him the engine needed an overhaul, for which it would charge him \$6,000 or \$7,000 and bear the rest of the expense itself. Burroughs now says it is owed \$19,680.84¹ for repairs to the truck, which it is still holding. Debtor contends that the repair cost to him should be the \$6,000 or \$7,000 he says he was quoted.

¹ Burroughs is actually claiming a total of \$25,571.93, but it is not clear whether the charges on page 2 of debtor's Exhibit 1 are related to repairs on the truck in question. The proof of claim filed by Burroughs (ECF 11-1) is only for \$5,574.33 in unsecured debt. Burroughs needs to correct its proof of claim if necessary so the lien claim can be addressed in debtor's plan, as discussed below.

Burroughs claims a possessory mechanic's lien on the truck pursuant to Mississippi Code § 85-7-107. At hearing, MB Financial, without stipulating as to the amount of any such lien, agreed that Burroughs's possessory mechanic's lien primes its pre-existing security interest in the truck pursuant to Mississippi Code § 7-9-333(b).

Debtor filed a motion for turnover pursuant to Bankruptcy Code § 542 but has not provided for Burroughs in his plan or offered any adequate protection. Under normal circumstances, a secured creditor does not lose its lien if required to turn over possession of the collateral to the debtor; its collateral risk is usually limited to depreciation, damage, or loss, against which the debtor can adequately protect by monthly payments and insurance. However, here Burroughs would lose its lien if required to turn over the truck because of the lien's possessory nature. In the absence of any form of adequate protection to compensate Burroughs for the loss of its lien, the Court denies without prejudice the debtor's motion for turnover. See In re Crowe, 160 B.R. 299 (Bankr. N.D. Tex. 1993) (turnover motion denied where debtor did not adequately protect possessory mechanic's lien).

Burroughs has moved for relief from stay under both Bankruptcy Code § 362(d)(1) and (d)(2). Burroughs has a first-position security interest in a truck with a value which exceeds its lien by a comfortable margin; the Court thus finds that its interest is adequately protected under § 362(d)(1). Debtor does not have any equity in the truck since, even if the Burroughs claim were only \$6,000, the total of the Burroughs and MB Financial liens would exceed both the truck's 2015 arms-length purchase price of \$66,200 and its Schedule B value of \$65,000. Burroughs has thus satisfied § 362(d)(2)(A). However, the Court does not have enough evidence to determine whether the truck is necessary to an effective reorganization, that is, one

which is “in prospect,” under § 362(d)(2)(B). See U.S. Sav. Assoc. of Texas v. Timbers of Inwood Forest Assoc., Ltd., 484 U.S. 365, 376 (1988). The debtor operates a small trucking business. It is not clear whether the debtor needs this truck in order to reorganize successfully and can confirm a plan which will allow him to keep it. Although pursuant to Code § 362(g)(2) the debtor has the burden of proof of showing that the truck is necessary to an effective reorganization, the Court will allow debtor an opportunity to address the Burroughs lien in light of its ruling on the turnover motion.

Debtor’s 341 meeting and confirmation hearing are currently set for March 24, 2016, and the non-governmental proof of claim deadline is April 6, 2016. The Court will continue Burroughs’s motion for relief from stay until after the confirmation hearing. If the debtor is unable or unwilling to confirm a plan which meets the requirements of § 1325(a) and which adequately protects Burroughs for turnover of the truck, the Court intends to grant Burroughs’s motion for relief from stay.

The Court thus orders as follows:

1. Debtor’s motion for turnover is denied without prejudice.
2. Burroughs’s motion for relief from stay is reset for status on April 13, 2016 at 8:30 a.m.

Dated: March 4, 2016


HENRY A. CALLAWAY
CHIEF U.S. BANKRUPTCY JUDGE