IN THE UNITED STATES BANKRUPTCY COURT

FOR THE DISTRICT OF UTAH

COUNTER COPY - DO NOT REMOVE - [redacted]

In re	)	Bankruptcy Case No. 81M-03652
AMERICAN-STREVELL, INC., a Utah corporation,	)	
Debtor.	)	Civil Proceeding No. 82PM-0379
AMERICAN-STREVELL, INC. a Utah corporation,	)	
Plaintiff.	)	
-vs-	)	
TERMICOLD CORPORATION,	)	
Defendant.	)	MEMORANDUM DECISION

Appearances: Robert D. Merrill and Thomas T. Billings, Van Cott, Bagley, Cornwall & McCarthy, Salt Lake City, Utah, and Earl A. Glick, Gendel, Raskoff, Shapiro & Quittner, Los Angeles, California, for debtor; Herbert H. Anderson and John W. Weil, Spears, Lubersky, Campbell, Bledsoe, Anderson & Young, Portland, Oregon, for Termicold Corporation.

FACTS

American Strevell (Strevell) filed its petition under Chapter 11 on December 11, 1981. Strevell sells groceries to retail stores. Prior to filing, Strevell stored several hundred thousand pounds of frozen turkeys in Termicold's warehouse. Termicold issued non-negotiable warehouse receipts covering storage and other charges for separate deliveries of the turkeys.

On each warehouse receipt Termicold claimed a lien for storage, handling, freezing, transportation, labor, interest, and expenses necessary for preservation and other expenses in relation to the goods as well as a lien for like charges on other goods.

In February 1982, Strevell contacted Termicold and demanded turnover of the turkeys remaining in Termicold's possession. These turkeys were covered by three invoices totaling $3,027.67. Strevell did not accompany its demand with a tender of the storage charges or an offer of adequate protection. After Termicold refused to deliver the turkeys, Strevell demanded turnover and Termicold again refused, asserting that Termicold held a warehouseman's lien for storage and other charges totaling $11,636.43 which it would lose if it voluntarily delivered the goods.

On April 21, 1982, Strevell filed a complaint seeking a turnover order.

On June 10, 1982, the parties stipulated that Termicold would turn over the turkeys and that Termicold's lien would be impressed on the proceeds from Strevell's sale of the turkeys pending the Court's determination of the validity of Termicold's lien. The Court so ordered on June 25, 1982.

On September 29, 1982, the Court held a hearing on this matter by conference call. Both parties submitted trial briefs. In its brief and at the hearing, Strevell made the following arguments: (1) Because the storage charges are really rent,

Termicold's lien is a statutory lien for rent avoidable by the trustee under 11 U.S.C. § 545; (2) Termicold's refusal to turn over the turkeys was unjustifiable, thereby causing Termicold to lose its lien under U.C.C. § 7-209(4); (3) Termicold failed to perfect its lien; (4) Termicold's retention of the turkeys violated the automatic stay; and (5) Termicold's conduct was contemptuous, justifying an award of attorney's fees.

Termicold argued: (1) it would lose its warehouseman's lien under U.C.C. § 7-209(4) if it voluntarily delivered the turkeys; (2) it had a consensual lien by virtue of a provision in the warehouse receipt; (3) its lien was perfected by issuance of the warehouse receipt; (4) its lien was not a lien for rent because there was no lessor-lessee relationship.

The Court took the matter under advisement and asked both parties for briefs on the relationship between §§ 542 and 363(e) of the Bankruptcy Code and § 7-209 of the U.C.C.

ISSUES

The parties have raised the following issues: (1) Did Termicold have a perfected lien on the frozen turkeys stored in its warehouse at the time the debtor filed its petition in bankruptcy? (2) Was Termicold's refusal to turn over property of the estate "unjustifiable" under Utah Code Ann. § 70A-7-209(4) thereby causing it to lose its statutory warehouseman's lien? (3) Was Termicold's lien for storage charges a "lien for rent" voidable by the trustee under § 545(4)?"

DISCUSSION

Issue 1: Did Termicold have a perfected lien good against the trustee at the time of filing?

Section 70A-7-209(1) provides:

> A warehouseman has a lien against the bailor on the goods covered by a warehouse receipt or on the proceeds thereof in his possession for charges for storage or transportation (including demurrage and terminal charges), insurance, labor, or charges present or future in relation to the goods, and for expenses necessary for preservation of the goods or reasonably incurred in their sale pursuant to law. If the person on whose account the goods are held is liable for like charges or expenses in relation to other goods whenever deposited and it is stated in the receipt that a lien is claimed for charges and expenses in relation to other goods, the warehouseman also has a lien against him for such charges and expenses whether or not the other goods have been delivered by the warehouseman. . . .

A "warehouseman" is "a person engaged in the business of storing goods for hire." 70A-7-102(1)(h). A warehouse receipt "means a receipt issued by a person engaged in the business of storing goods for hire." 70A-1-201(45). A warehouse receipt need not be in any particular form. 70A-7-202(1).

Under § 70A-7-209, all that is necessary for perfection of a warehouseman's lien is possession by the warehouseman of goods covered by a warehouse receipt. The lien is for charges present or future in relation to the goods. If stated in the warehouse receipt, the lien extends to like charges for other goods

deposited by the same bailor even if the other goods have already been delivered by the warehouseman.

Termicold issued warehouse receipts covering the turkeys. Termicold is "engaged in the business of storing goods for hire." At the time of filing, Termicold possessed frozen turkeys covered by warehouse receipts and Strevell owed Termicold storage and related charges. The warehouse receipts stated that a lien was claimed for like charges on other goods deposited by the same bailor. No further act of seizure or notification is required by § 70A-7-209. Under Utah law, Termicold had a statutory warehouseman's lien perfected as of the date of filing. This statutory lien is good as against a bona fide purchaser for value.

Termicold claims it has a consensual lien in addition to its statutory lien. One of the terms on the warehouse receipt is entitled "Lien of Warehouseman" and purports to claim a lien on goods covered by the warehouse receipt for storage and related charges on those goods and other goods deposited by the same bailor.

A security interest is not enforceable unless the collateral is in possession of the secured party pursuant to agreement or the debtor has signed a security agreement. 70A-9-203(1). An "agreement" means "bargain of the parties in fact as found in their language or by implication from other circumstances. . . ."

70A-1-201(3). Although the turkeys were in Termicold's possession, the parties intended a bailment contract not a security interest. The purpose of the term in the warehouse receipt is to extend the lien to goods other than those covered in the warehouse receipts as permitted by 70A-7-209(1) by so stating on the warehouse receipt. Since an agreement to create a security interest is lacking, Termicold does not have a security interest in the turkeys, but does have a valid statutory lien as of the date of filing bankruptcy.

Issue 2: Was Termicold's refusal to turn over the turkeys "unjustifiable" under Utah Code Ann. § 70A-7-209(4)?

Section 70A-7-209(4) provides: "A warehouseman loses his lien on any goods which he voluntarily delivers or unjustifiably refuses to deliver."

The Utah Supreme Court has not yet decided what does or does not constitute an "unjustifiable refusal to deliver." Other jurisdictions have found unjustifiable refusal in only two instances: first, when the warehouseman refuses to deliver the goods after the bailor tenders payment of the storage charges, Jimani Corp. v. S.L.T. Warehouse Co., 409 So. 2d 496 (Fla. App. 1982); Cannon v. Northside Transfer Co., Inc., 427 N.E. 2d 712 (Ind. App. 1981), and second, when the warehouseman refuses to deliver until payment of additional charges exceeding those covered by the warehouse receipt, Assoc. Bean Growers v. Chester Brown Co., 255 N.W. 2d (Neb. 1977).

Strevell argues that § 542 mandates that Termicold turn over any property of the estate in its possession immediately following the filing of the petition and that Termicold's failure to do so violates both § 542 and the § 362 automatic stay. Strevell seems to be arguing that the violation of federal bankruptcy law is the kind of unjustifiable refusal that causes a warehouseman to lose its lien under state law. Two questions emerge: first, did Termicold violate federal law and second, is violation of federal law an "unjustifiable refusal" under § 70A-7-209.

Termicold's position is that under § 70A-7-209, it would have lost its lien if it had voluntarily delivered the turkeys; in order to preserve its lien, it cannot deliver the turkeys unless compelled to do so by law. Case law and legislative history support Termicold's contention. The U.C.C. provision that a warehouseman loses its lien on goods which he voluntarily delivers dates back to 1906, the year of the enactment of the Uniform Warehouse Receipts Act. Originally, the U.C.C. § 7-209(4) read, " a warehouseman loses his lien on any goods . . . which he surrenders." (Emphasis added). In 1956, the Editorial Board for the U.C.C., National Conference of Commissioners on Uniform State Law, recommended that subsection (4) be changed to read: "A warehouseman loses his lien on any goods which he voluntarily delivers . . ." (emphasis added) to meet objections that the bailee might lose his lien by involuntary surrender under court order.

Section 542(a) "requires an entity (other than a custodian) holding any property of the debtor that the trustee can use under § 363 to turn that property over to the trustee." United States v. Whiting Pools, Inc., _____ U.S. _____, 10 B.C.D. 705, 709 (1983). Because turnover by Termicold as required by statute would not have been voluntary, Termicold would not have lost its lien by delivering the turkeys to Strevell.

Strevell argues that the burden is on the creditor to seek adequate protection -- the Code mandates immediate turnover and forcing the debtor to seek a turnover order violates § 542 and is unjust and unreasonable.

Strevell cites Collier in support of its position:

> Suppose a creditor is in possession of a collateral that the trustee may use, sell, or lease under Section 363. Must the creditor turn over the collateral to the trustee immediately after the commencement of the case or does the creditor have the right to demand adequate protection of its interest in the collateral under section 363(e)? The better view is that turnover must be tendered immediately after the commencement of the case but that adequate protection is a condition precedent to turnover if demanded by the creditor.

4 COLLIER ON BANKRUPTCY, ¶ 542.02, at 542-6 (15th ed. 1982).

Section 542(a) requires parties holding property subject to turnover to seek protection of their interest "according to the congressionally established procedures, rather than by withholding the . . . property from the debtor's efforts to reorganize." Whiting Pools, supra at 712.

The legislative history of § 542 implies that a creditor should immediately turn over property of the estate in its possession:

> Section 542(a) of the House amendment modifies similar provisions contained in the House bill and the Senate amendment treating with turnover of property to the estate. The section makes clear that any entity, other than a custodian, is required to deliver property of the estate to the trustee or debtor in possession whenever such property is acquired by the entity during the case, if the trustee or debtor in possession may use, sell, or lease the property under section 363, or if the debtor may exempt the property under section 522, unless the property is of inconsequential value or benefit to the estate. This section is not intended to require an entity to deliver property to the trustee if such entity has obtained an order of the court authorizing the entity to retain possession, custody, or control of the property.

124 Cong. Rec. H 11,096-7 (Sept. 28, 1978); S 17,413 (Oct. 6, 1978). This statement, however, also implies that a creditor may seek adequate protection before delivering property to the debtor.

"Congressionally established procedures" for seeking protection of an interest in property include requesting the bankruptcy court pursuant to Section 363(e) to determine adequate protection requirements. But both common sense and prudent practice recommend private negotiation between the parties before seeking court intervention. A secured party holding property subject to turnover may hold the property pending negotiation of

a satisfactory means of protecting that party's interest in the property. If negotiations break down, either party may seek a court determination.

This is, in fact, exactly what happened in this case. The parties did not agree and Strevell asked the court to intervene. Then by stipulation the turkeys were sold pending a judicial determination of the validity of Termicold's lien.

Had Strevell added to its turnover request an offer of clearly adequate protection and if Termicold had refused to accept the offer, Termicold's refusal to deliver the turkeys to Strevell may well have been unjustified. But on the facts of this case, Termicold's refusal was justified.

Strevell's argument that Termicold violated the automatic stay is without merit. Merely retaining the property already in its possession was not an act forbidden by § 362. Termicold did not take any of the steps that would have been necessary under § 70A-7-210 to enforce its lien, nor did it act to obtain possession of the property, or to perfect its lien.

Thus, Termicold did not violate any of the provisions of bankruptcy law, making it unnecessary to decide whether violations of bankruptcy law constitute "unjustifiable refusal" under § 7-209(4).

Issue 3: Was Termicold's lien for storage charges a "lien for rent" voidable by the trustee under § 545(4)?

The general rule is that the relationship between a warehouseman and a depositor of goods is that of bailor-bailee. The warehouseman is a bailee for hire and the rights and duties of the parties are governed by the law of bailments. Brace v. Salem Cold Storage, Inc., 118 S.E. 2d 799 at 804 (W. Va. 1961); Dahl v. St. Paul Fire & Marine Insurance Co., 153 N.W. 2d 624 at 625 (Wis. 1967); 78 Am Jur 2d Warehouses § 25 (1975). See also Barlow Upholstery & Furniture Co. v. Emmel, 533 P. 2d 900 (Utah 1975). Under § 70A-1-103, the principles of law and equity supplement the provisions of the U.C.C. Section 70A-7-209 refers to the depositor of goods as a "bailor."

Several courts have decided whether a particular transaction constitutes a bailment of personal property or a rental of the place of storage. The cases usually arise when the stored goods have been destroyed or damaged and the warehouseman denies liability for negligence in caring for the goods because the relationship was actually one of landlord-tenant rather than bailor-bailee.

In the leading case of Zweeres v. Thibault, 23 A. 2d 529 (Vt. 1942), the court stated the test for distinguishing a bailment from a lease:

> In this case it is necessary to distinguish a bailment from a lease. Where personal property is left upon another's premises under circumstances from which either relation might possibly be predicated, the test is whether or not the person leaving the property has made such a delivery as to amount to a relinquishment, for the duration

> of the relation, of his exclusive possession, control, and dominion over the property, so that the person upon whose premises it is left can exclude, within the limits of the agreement, the possession of all others. If he has, the general rule is that the transaction is a bailment. On the other hand, if there is no such delivery and relinquishment of exclusive possession, and his control and dominion over the goods is dependent in no degree upon the co-operation of the owner of the premises, and his access thereto is in no wise subject to the latter's control, it is generally held that he is a tenant or lessee of the space upon the premises where the goods are kept. Considered from the opposite viewpoint, a tenant, but not a bailor, has the exclusive possession and control of, and dominion over, the portion of the other party's premises where the goods are kept, for the duration of the term of his lease. In a doubtful case consideration should be given to the manifested intention of the parties, whether the care of personal property or only the rental of a place to put it was contemplated.

6 Am. Jur., Bailments, Sec. 59. See also 138 ALR 1137 (1942), 78 Am. Jur. 2d § 26 at 188 (1975).

When Strevell delivered the turkeys to Termicold, it relinquished exclusive control and possession of the turkeys. Termicold designated the place where the turkeys were to be stored and Termicold controlled access to the turkeys. Termicold could exclude all others from possession of the turkeys and from the particular place where the turkeys were stored. The contract was clearly that of bailment, not lease. That courts use the words "storage charges" and "rent" interchangeably in other circumstances has no bearing in this case; the relationships of

bailment and landlord-tenant are mutually exclusive. Thus, the storage charges are not "rent" and Termicold's lien is not a lien for rent avoidable by the trustee under § 545.

CONCLUSION

Termicold had a valid warehouseman's lien on property of the debtor in its possession under Utah Code Ann. § 70A-7-209 at the time Strevell filed its petition in bankruptcy. Termicold's refusal to deliver the property voluntarily did not violate § 542 or § 362 of the Bankruptcy Code; nor was its refusal unjustifiable under Utah Code Ann. § 70A-7-209, causing Termicold to lose its lien. Termicold has a valid lien on the proceeds from the sale of the turkeys and is entitled to recover the full amount of its charges.

Counsel for Termicold shall submit a conforming order.

DATED this 22 day of July, 1983.

BY THE COURT:

Glen E. Clark

GLEN E. CLARK
UNITED STATES BANKRUPTCY JUDGE