

**IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF KANSAS**

In re:)	
)	
DALE LEE JONES and)	Case No. 97-41205-7
LYNN ANN JONES,)	
)	
Debtors.)	
_____)	
)	
ROBERT L. BAER, Trustee,)	
)	
Plaintiff,)	
)	
v.)	Adversary No. 01-7131
)	
ALMA JEAN BOWSER,)	
)	
Defendant.)	
_____)	

**MEMORANDUM AND ORDER GRANTING TRUSTEE’S
MOTION FOR SUMMARY JUDGMENT, AND DENYING
DEFENDANT’S COUNTER-MOTION FOR SUMMARY JUDGMENT**

This matter is before the Court on the Trustee’s Motion for Summary Judgment (Doc. 25), and Defendant’s Counter-Motion for Summary Judgment (Doc. 27). The Court has reviewed the briefs submitted by the parties and is now prepared to rule.

I. FINDINGS OF FACT

Based upon the briefs of the parties, the Court makes the following findings of fact:¹

1. Dale Lee Jones and Lynn Ann Jones (hereinafter “Debtors”) filed a voluntary petition seeking relief under Chapter 13 of the Bankruptcy Code on May 8, 1997.

¹These facts were either uncontroverted, or are viewed in the light most favorable to Defendant Bowser, the non-moving party on Plaintiff’s Motion.

2. Debtors operated an ambulance service during the time this case proceeded under Chapter 13.
3. On or about March 24, 1998, Defendant Alma Jean Bowser (hereinafter “Bowser”) loaned Debtors \$16,895 to purchase an ambulance. In exchange for the money, Bowser was added as a lienholder on the ambulance’s title.
4. Debtors did not seek authority under 11 U.S.C. § 364, or otherwise, to borrow funds from Bowser, nor did Debtors seek authority to give Bowser a lien on any property.
5. Approximately two years later, on or about May 15, 2000, Debtors filed a motion seeking approval to sell the ambulance service and its assets, including the ambulance, which was granted July 10, 2000.
6. The July 10, 2000 Order approving the sale of the ambulance service required the proceeds from the sale to be distributed as follows:
 - A. First, the reasonable costs and expenses of the sale;
 - B. Second, to pay the balances on secured claims owed to Capitol City Bank, Modern Acceptance, S & P Financial and Stratus Specialty;
 - C. Third to pay any outstanding priority tax claims owed to the IRS;
 - D. Fourth, to pay Old Republic Financial Acceptance Corporation for its second mortgage on Debtors’ real estate;
 - E. Fifth, to Debtors in the sum of \$7,500 for their tools of the trade exemption; and

F. Lastly, any remaining proceeds were to be paid to the Chapter 13 Trustee for distributions to unsecured creditors pursuant to Debtors' confirmed Chapter 13 Plan.

7. Pursuant to the July 10, 2000 Order, no distribution from the sale of the ambulance service and its assets was designated for Bowser.
8. The sale approved by the Court's July 10, 2000 Order was not a sale free and clear of liens and encumbrances on the assets of the ambulance service.
9. Following the sale of the ambulance service and its assets, Bowser received two checks totaling \$8,114.01 from the closing of the transaction.
10. Bowser had no knowledge or notice of the pending bankruptcy matter at the time she loaned the funds to Debtors to purchase the ambulance.
11. Bowser had no knowledge or notice of the Court's July 10, 2000 Order authorizing the sale of the ambulance service and its assets.

II. STANDARD FOR SUMMARY JUDGMENT

Summary judgment is appropriate if the moving party demonstrates that there is "no genuine issue as to any material fact" and that it is "entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(c). The rule provides that "the mere existence of some alleged factual dispute between the parties will not defeat an otherwise properly supported motion for summary judgment; the requirement is that there be no genuine issue of material fact." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247-48 (1986). The substantive law identifies which facts are material. *Id.* at 248. A dispute over a material fact is genuine when the evidence is such that a reasonable jury could find for the nonmovant. *Id.* "Only disputes over facts that

might affect the outcome of the suit under the governing law will properly preclude the entry of summary judgment.” *Id.*

The movant has the initial burden of showing the absence of a genuine issue of material fact. *Shapolia v. Los Alamos Nat'l Lab.*, 992 F.2d 1033, 1036 (10th Cir.1993). The movant may discharge its burden “by ‘showing’ – that is, pointing out to the district court – that there is an absence of evidence to support the nonmoving party’s case.” *Celotex Corp. v. Catrett*, 477 U.S. 317, 325 (1986). The movant need not negate the nonmovant's claim. *Id.* at 323. Once the movant makes a properly supported motion, the nonmovant must do more than merely show there is some metaphysicaldoubt as to the material facts. *Matsushita Elec. Indus. Co., Ltd. v. Zenith Radio Corp.*, 475 U.S. 574, 586 (1986). The nonmovant must go beyond the pleadings and, by affidavits or depositions, answers to interrogatories, and admissions on file, designate specific facts showing there is a genuine issue for trial. *Celotex*, 477 U.S. at 324. Rule 56(c) requires the Court enter summary judgment against a nonmovant who fails to make a showing sufficient to establish the existence of an essential element to that party's case, and on which that party will bear the burden of proof. *Id.* at 322.

III. ANALYSIS

A. The ambulance was property of the estate at all times relevant to this case.

Bowser contends that the ambulance was not part of the bankruptcy estate, and therefore the Trustee cannot seek to recover the proceeds its sale. The ambulance was not owned by Debtors at the time they filed their bankruptcy petition. Because it was acquired by Debtors before the case was converted to Chapter 7, however, it did become property of the estate pursuant to § 1306(a)(1).

Bowser contends that the ambulance, and the proceeds that resulted from its sale, were no longer part of the estate following the conversion of the case to Chapter 7. Bowser's position is consistent with § 348(f)(1)(A), which provides that "property of the estate in the converted case shall consist of property of the estate, as of the date of filing of the petition, that remains in the possession of or is under the control of the debtor on the date of conversion." 11 U.S.C. § 348(f)(1)(A).² In making this argument, however, Bowser fails to recognize one critical point. At the time the Court authorized the sale of the ambulance, at the time the ambulance was sold, and at the time the funds from the sale were distributed, the ambulance was property of the bankruptcy estate, because all those events occurred prior to the conversion of this case.

The fact that the ambulance would not have remained part of the estate following the conversion, had it not been sold, is not material in this analysis. The Trustee is no longer seeking to recover property of the estate under § 549 and § 550. Instead, the Trustee is seeking enforcement of the Court's July 10, 2000 Order that specifically outlined how the proceeds from the sale of the business were to be distributed. Because the ambulance was property of the estate at the time of the sale and at the time the funds from the sale were distributed, the Trustee is correct in requesting enforcement, and the Court has the authority to enforce the Court's order as it pertained to that property.

B. Bowser did not have a valid lien in the ambulance.

The next issue before the Court is whether Bowser had a valid lien against the ambulance. It is undisputed that Bowser loaned Debtors the money to purchase the ambulance, and that she was added

²Section 348(f)(2) provides an exception to this rule when the court finds that the conversion was done in bad faith. No allegation of bad faith conversion has been raised in this case.

to the title of the ambulance as a lienholder. However, Debtors failed to obtain approval from the Court prior to borrowing these funds. According to the Trustee, the failure to obtain approval to borrow the money invalidates any lien Bowser may have obtained, and renders her nothing more than an unsecured creditor of Debtors.

The Bankruptcy Code unequivocally requires debtors engaged in operating a business to obtain court approval prior to incurring any debt, including secured debt, outside the ordinary course of business, during the pendency of their bankruptcy case. *See* 11 U.S.C. § 364. The amount of any lien on property securing debt obtained during the pendency of a bankruptcy case is limited to the amount of debt incurred after obtaining court approval. *See In re Bono Development, Inc.*, 8 F.3d 720, 721 (10th Cir. 1993).

It is uncontroverted that Debtors failed to obtain court approval to incur debt from Bowser. Therefore, she does not, and never did, have a lien in Debtors' property. The purported lien in the ambulance was invalid based upon the Debtors' failure to comply with § 364.

Bowser contends the Court should utilize its equitable powers, under §105(a), to retroactively approve the loan to Debtors, thereby bringing Debtors into compliance with § 364. The Court's equitable powers in bankruptcy, however, "must and can only be exercised within the confines of the Bankruptcy Code." *Norwest Bank Worthington v. Ahlers*, 485 U.S. 197 (1988). The Court's equitable powers under § 105 "may not be exercised in a manner that is inconsistent with the other, more specific provisions of the [Bankruptcy] Code." *United States v. Richards (In re Richards)*, 994 F.2d 763, 765 (10th Cir.1993).

The issue of whether a court should exercise its powers under § 105(a) to retroactively approve, under § 364, a debt incurred during a bankruptcy was recently discussed in this District. Judge Flannagan

held that the court's equitable powers could not be used to override the specific provisions contained in § 364. *In re Lodge America, Inc.*, 239 B.R. 580, 584 (Bankr. D. Kan. 1999). Judge Flannagan noted that the creditor in that case, as the creditor in this case, appeared to be an innocent victim of the debtor's failure to comply with § 364, and that the creditor would therefore be entitled to the benefits of the Court's equitable powers, if those powers could be appropriately exercised in the case. *Id.* In affirming the Bankruptcy Court, the District Court held that

“[t]he language of § 364 covers every situation---in ordinary course of business and not in ordinary course of business, with a hearing and without a hearing. Therefore, the court finds that to issue an order nunc pro tunc retroactively authorizing the debtor to obtain unsecured credit, not in the ordinary course of business, and without notice and a hearing would be inconsistent with the specific provisions of § 364 of the Code.”

In re Lodge America, Inc., 259 BR. 728, 735 (D. Kan. 2001)

This Court agrees with the holding in *In re Lodge America, Inc.* Section 364 is very specific in its terms and clearly states that the Jones, the Debtors in this case, were required to obtain a court order allowing the loan before incurring the additional secured debt from Bowser. The Court's equitable powers under § 105(a) cannot be used to override the specific provisions contained in § 364.

C. The July 10, 2000 Order is valid as to Bowser.

Bowser claims that the July 10, 2000 order is void as to her, because she did not receive notice of the sale of the ambulance and was not aware of the pending bankruptcy. According to Bowser, this lack of notice violated her due process rights. The Trustee responds that Bowser was not entitled to notice under the Bankruptcy Code and, even if she was so entitled, the July 10, 2000 Order did not violate her due process rights.

“Due process mandates that there be an opportunity for some kind of hearing before a person is finally deprived of his or her property, and that such hearing occur at a meaningful time and in a meaningful manner. The contours of due process are flexible, however, and the requirement of a hearing is limited to that which is appropriate to the nature of the case.” *In re Morton*, 298 BR. 301, 306 (6th Cir. B.A.P. 2003). In a bankruptcy setting, due process “requires that notice be given to a creditor whose property rights are being affected so that the creditor may have its day in court.” *In re Marcus Hook Development Park, Inc.*, 143 BR. 648, 660 (Bankr. W.D. Pa. 1992).

The Court finds that Bowser’s due process rights were not violated by the July 10, 2000 Order. As noted above, she did not have a valid lien in the ambulance, as the purported lien was obtained without the prior Court approval required by § 364. Therefore, she had no property interest in the ambulance at the time it was sold. Based on the lack of property interest in the ambulance, Bowser has no claim that her property rights were taken without due process.³

D. The Court has the power under § 105(a) to enforce its prior order.

Bowser contends that the Trustee lacks standing to seek the return of the funds improperly paid to her, and that the Court lacks the authority to order the funds returned. Bowser bases this argument on the effect § 348(f)(1)(A) had on the bankruptcy estate on the date of conversion. As discussed previously, § 348(f)(1)(A) states that “property of the estate in the converted case shall consist of property of the

³The Trustee also argues that Bowser’s due process rights were not violated because the ambulance was not sold free and clear of any liens or encumbrances, as is usually done in cases such as this, but instead was sold subject to any existing liens. Therefore, according to the Trustee, even if Bowser did have a valid lien in the ambulance, Bowser’s lien would remain intact, and presumably she could pursue the new owners of the ambulance for repayment. However, because the Court has already found that Bowser does not have a valid lien on the ambulance, this issue is moot.

estate, as of the date of filing of the petition, that remains in the possession of or is under the control of the debtor on the date of conversion.” 11 U.S.C. § 348(f)(1)(A). Because the ambulance was acquired after the petition was filed, and there is no finding that the conversion was sought in bad faith by Debtors, it would not have been property of the Chapter 7 estate following the conversion. Bowser contends that, because the ambulance would not have been property of the estate at the time of conversion, the Trustee lacks standing to avoid the lien or to seek to recover the proceeds from the sale of the ambulance. In addition, Bowser contends that the Court cannot utilize § 105(a) to avoid the impact of § 348(f)(1)(A), and bring the ambulance, or the proceeds from its sale, back into the estate.

As an initial matter, Bowser’s contention that the Trustee lacks standing to avoid the lien on the ambulance is without merit. The Trustee is not seeking to utilize his powers under the Bankruptcy Code to avoid an otherwise valid lien on estate property for the benefit of the estate. Because Debtors failed to obtain approval for the loan from Bowser in the first instance, the alleged lien against the ambulance never existed. The lien she is attempting to assert in this case was void *ab initio*; it was not voidable by the Trustee.

The Trustee is asking the Court for an order that enforces a prior Court order. The initial order was clearly valid, as it authorized the sale of property that was at that time part of the bankruptcy estate, including the ambulance, and ordered the distribution of the proceeds from the sale of that estate consistent with the priorities and security interests of the creditors to this estate. For unknown reasons, the Court’s prior order was not followed, resulting in the payment of \$8,114.01 to Bowser that she was not entitled to receive.

Section 105 specifically contemplates its use “to enforce or implement court orders.” Thus, the Court can think of no better use of its equity powers under § 105 than to issue an order that compels compliance with a previous order.

IV. CONCLUSION

The Court finds that the Trustee is entitled to Summary Judgment in this case. Debtors borrowed money from Bowser to purchase an ambulance during the pendency of their Chapter 13 case without first obtaining Court approval. The lack of prior Court approval invalidated any lien Bowser could claim on the ambulance, leaving her as, at best, a general, unsecured creditor. On July 10, 2000, the Court issued a valid order authorizing the sale of the ambulance business, including the ambulance at issue in this case. Although the July 10, 2000 Order specifically detailed how the proceeds from that sale of estate property were to be distributed, the bank distributing the funds failed to comply with that order and erroneously distributed over \$8,000 to Bowser. She was not entitled to receive these funds, and the Trustee has the authority to seek return of those funds to the bankruptcy estate for distribution to the appropriate creditors.

IT IS, THEREFORE, BY THIS COURT ORDERED that the Trustee’s Motion for Summary Judgment (Doc. 25) is granted, and Defendant’s Counter-Motion for Summary Judgment (Doc. 27) is denied.

IT IS FURTHER ORDERED that judgment shall be entered in favor of the Trustee in the amount of \$8,114.01, plus interest after judgment at the rate set forth in 28 U.S.C. § 1961, and costs.

IT IS FURTHER ORDERED that the foregoing constitutes Findings of Fact and Conclusions of Law under Rule 7052 of the Federal Rules of Bankruptcy Procedure and Rule 52(a) of the Federal

Rules of Civil Procedure. A judgment based on this ruling will be entered on a separate document as required by Fed. R. Bankr. P. 9021 and Fed. R. Civ. P. 58.

IT IS SO ORDERED this __ day of November, 2003.

JANICEMILLERKARLIN, BANKRUPTCY JUDGE
UNITED STATES BANKRUPTCY COURT
DISTRICT OF KANSAS