UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF NEW YORK

In re:

ANDREW N. LAVIGNE,

Debtor.

Case No.: 06-30090

Chapter 11

STUART ANDERSON and JOAN ANDERSON,

Plaintiffs,

v.

MICHAEL A. LOGUIDICE in his official capacity as Trustee of the Bankruptcy Estate of Andrew N. LaVigne, ANDREW N. LAVIGNE, TOMPKINS COUNTY SHERIFF, WEHUDI WYNER and SUSAN DAVENNY WYNER, TOMPKINS TRUST COMPANY, and CLASSICS FOR COLLECTORS, LLC.

Defendants.

Adv. Proc. No.: 05-80013

Margaret Cangilos-Ruiz, U.S. Bankruptcy Judge

MEMORANDUM-DECISION AND ORDER

Michael A. Loguidice, the chapter 11 trustee ("Trustee"), has moved for partial summary judgment in this pending adversary proceeding pursuant to Federal Rule of Bankruptcy Procedure 7056, which incorporates by reference Rule 56 of the Federal Rules of Civil Procedure. At issue is the relative priority of Trustee and plaintiff judgment creditor in and to proceeds resulting from the sale of two types of personal property as to which a writ of execution was served pre-petition. Trustee seeks a declaration that his interest in personal property that pre-petition had been levied on by the Sheriff of Tompkins County, New York ("Sheriff") and transported to Pennsylvania for sale is superior to the interests of Sheriff and all other creditors.

Trustee also seeks a money judgment of $100,000.00 against plaintiffs Stuart and Joan Anderson ("Andersons") for sale proceeds paid over to them on account of other personal property sold at auction in New York. In addition, Trustee seeks judgment against the Sheriff for $5,000.00, which represents the amount that Sheriff retained as poundage from the auction sale in New York. At the heart of the matter are somewhat unique questions arising under New York Civil Practice Law and Rules and the breadth and reach of the Trustee's strong arm powers under section 544 of the United States Bankruptcy Code, 11 U.S.C. §§ 101 - 1532 ("Bankruptcy Code" or "Code"). This memorandum-decision incorporates the court's findings of fact and conclusions of law as permitted, though not required, by Federal Rule of Bankruptcy Procedure 7052.

JURISDICTIONAL STATEMENT

The Court has core jurisdiction of this matter pursuant to 28 U.S.C. §§ 1334, 157(a) and (b)(2)(K).

FACTS

The record before the Court consists of Trustee's motion for partial summary judgment with supporting affidavit of Lawrence M. Ordway ("Ordway Affidavit"), sworn to on February 19, 2007 ("Motion"), Trustee's statement of material facts submitted pursuant to Local Bankruptcy Rule 7056-1 ("7056-1 Statement" at docket number ("D.N.") 109), Andersons' affidavit of Edward Y. Crossmore in opposition to the Motion, sworn to on March 1, 2007 (D.N. 113), Andersons' response to Trustee's 7056-1 Statement (D.N. 114), Sheriff's response to the Motion and affidavit of Richard P. Ruswick, sworn to on March 1, 2007 (D.N. 115, 119), Andersons' memorandum of law in opposition to the Motion (D.N. 116), Sheriff's memorandum of law in opposition to the Motion (D.N. 117), Trustee's reply to Andersons' and Sheriff's

opposition (D.N. 122), Andersons' responding memorandum of law (D.N. 127), Andersons' supplemental affidavit of Edward Y. Crossmore sworn to on March 26, 2007 (D.N. 128), Sheriff's supplemental memorandum of law in opposition to the Motion (D.N. 130), Sheriff's supplemental affidavit of Richard P. Ruswick sworn to on March 26, 2007 (D.N. 131), Trustee's response to Andersons' and Sheriff's second memoranda in opposition to the Motion (D.N. 133) and the underlying pleadings in this action.[1]

Between October of 2001 and September of 2002, Debtor issued at least twenty-two promissory notes to Andersons which evidence approximately $400,000.00 in loans given by Andersons to Debtor. On January 12, 2004, the New York Supreme Court in Tompkins County entered default judgment against Debtor directing Debtor to pay Andersons $447,321.19 based on Debtor's payment defaults under the notes.[2] On January 15, 2004, Andersons served Sheriff with a property execution ("Execution") and restraining notice, along with a letter of instruction directing Sheriff to serve the restraining notice on Debtor and levy upon all of Debtor's personal property.[3] On January 30, 2004, pursuant to the Execution, Sheriff levied upon certain items of sports, entertainment, and political memorabilia ("Memorabilia") located at Debtor's office by tagging the items and leaving them in place in the office. Sheriff later returned to Debtor's office

[1] Andersons' complaint (D.N. 1), Defendant Tompkins Trust Company's ("TTC") answer, counterclaim and cross-claim (D.N. 5), Andersons' answer to TTC's counterclaim (D.N. 7), Sheriff's answer and TTC's cross-claim with counterclaim and cross-claims (D.N. 9), Trustee's amended answer with counterclaims and cross-claims ("Trustee's Amended Answer") (D.N. 95), Debtor's answer (D.N. 13), Andersons' reply to Sheriff's answer (D.N. 14), Andersons' answer to Trustee's and Classics for Collectors ("Classics") counterclaim with additional claim with regard to Classics (D.N. 17), Defendants Susan and Yehudi Wyner's ("Wyners") answer to Trustee's cross-claims (D.N. 19), Trustee's answer to TTC's cross-claim (D.N. 20), Trustee's answer to Sheriff's cross-claim (D.N. 22), Sheriff's answer to Trustee's cross-claim (D.N. 24), Debtor's answer to TTC's cross-claim (D.N. 79), Wyners' answer to Trustee's cross-claims (D.N. 80), Wyners' answer to Sheriff's cross-claims (D.N. 82), Andersons' answer to Trustee's Amended Answer (D.N. 99), Sheriff's amended answer to T's Amended Answer (D.N. 101), Wyners' answer to Trustee's Amended Answer (D.N. 102), and TTC's answer to Trustee's Amended Answer (D.N. 103).

[2] Andersons began proceedings against Debtor in Tompkins County Supreme Court by serving a verified summons and complaint upon Debtor. Debtor failed to answer the complaint and after Debtor's time to answer had expired, the court entered default judgment against Debtor in the amount of $388,587.39 (principle), $56,289.80 (interest), $1,920.00 (attorney's fees), and $524.00 (costs and disbursements).

[3] The Execution covers all "…personal property of the above named judgment debtor and the debts due to him;" and directs that the same "…shall be levied upon or sold hereunder…"

and removed the Memorabilia on two separate dates: on or about March 2, 2004 and on or about May 11, 2004.

On March 31, 2004, the Supreme Court of Tompkins County entered an order authorizing Sheriff to hire an auction service and arrange for a special sale of the Memorabilia. The order gave Andersons a choice between two auction services for Sheriff to utilize. Andersons chose to use Hunt Auctions, Inc. ("Hunt"), a company located in Pennsylvania, because Hunt purportedly had the ability to obtain the highest prices for the items. The parties involved determined that Sheriff could not perform the proper authentication and valuation procedures and would not be able to obtain top dollar for the Memorabilia at an auction run by Sheriff in Tompkins County. Andersons chose to use Hunt, a recognized auction service which specializes in auctions of this type, because Hunt could provide the authentication and valuation required, and could also reach a more sophisticated market by holding the auctions at their location in Pennsylvania instead of New York.

After Andersons received court approval to have Sheriff hire Hunt, the Memorabilia was transported from Tompkins County, New York, to Hunt's auction location in Pennsylvania on two occasions: on or about May 14, 2004 and on December 20, 2004. However, on June 4, 2004, before the auction sales in Pennsylvania took place, Debtor filed for relief under chapter 11 of the Bankruptcy Code. Hunt then held the first of three auctions in August of 2004.[4] On September 14, 2004, the court appointed Trustee to serve as chapter 11 trustee in Debtor's case.

In addition to the Memorabilia, Debtor held possession of a promissory note ("Manos Note" or "Note") which evidenced a debt owed by William Manos ("Manos") to Debtor in the

[4] Hunt held three auctions: the first in August 2004, the second in September 2004, and the third in February 2005. For the final sale which took place in February of 2005, the property to be sold was transported to Hunt's facility in Pennsylvania on December 20, 2004. The sales proceeded upon stipulation of the parties, as approved by the court, with a reservation of all rights.

amount of $132,000.00. At an examination of Debtor on February 11, 2004, Debtor produced a copy of the original Note dated July 7, 1998. Debtor also revealed that the Note was secured by a mortgage on several parcels of real property. Debtor testified that Manos had never made any payments on the Note. Due to an applicable six-year statute of limitations, if no payments were collected and no formal collection proceedings initiated, enforcement of the note would be time-barred on July 7, 2004.

Realizing time was of the essence, Andersons commenced a special proceeding in the Supreme Court of Tompkins County under section 5225 of the New York Civil Practice Law & Rules ("C.P.L.R.") seeking an order compelling Debtor to endorse the promissory note "in blank" and turn it over to Sheriff on March 2, 2004. *See* C.P.L.R. § 5225 (2008). On March 31, 2004, the Tompkins County Supreme Court entered an order compelling the endorsement and turnover to Sheriff. However, instead of turning over the Manos Note, Debtor signed an affidavit stating that he had lost the note. Debtor also signed an assignment of his "right, title, and interest" in the Manos Note and underlying debt ("Assignment") "in blank" and turned the Assignment over to Sheriff as well.

Once the Andersons recognized that their attempted enforcement efforts would not result in obtaining the original Manos Note, they served a Subpoena Duces Tecum on Manos on April 19, 2004, directing Manos to provide information regarding the $132,000.00 debt that he owed to Debtor.

On May 7, 2004, Andersons directed Sheriff to sell the Assignment at auction. Manos attended the auction, which Sheriff held on May 27, 2004, and successfully bid $100,000.00 for the Assignment. Manos paid Sheriff in two installments; he paid the first installment of $10,000.00 on May 27, 2004 and the second installment of $90,000.00 on June 1, 2004. Sheriff

retained $5,000.00 for his poundage and turned the remaining $95,000.00 over to Andersons in partial satisfaction of their judgment against Debtor. On June 7, 2004, Sheriff assigned the mortgage securing the Note to Manos. Sheriff paid Andersons on two separate dates: on June 15, 2004, and on July 15, 2004.

Debtor also received loans from the Wyners in the approximate aggregate amount of $400,000.00. On May 10, 2004, the Wyners recovered a default judgment against Debtor in the amount of $462,754.73 from the Supreme Court of Tompkins County. On May 11, 2004, the Wyners served the Sheriff with an execution based on their judgment.

DISCUSSION

A. Standard for Summary Judgment

A motion seeking summary judgment should be granted, "… if the pleadings, the discovery and disclosure materials on file, and any affidavits show that there is no genuine issue as to material fact and that the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(c), incorporated by reference in Fed.R. Bankr. P. 7056. The initial burden is on the moving party to demonstrate that no genuine issue as to any material fact exists. *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986); *Gallo v. Prudential Residential Servs., Ltd.*, 22 F.3d 1219, 1223–24 (2nd Cir. 1994). Once the moving party has made that showing, the nonmoving party must present competent evidence of the existence of a material issue of fact. *Matsushita Elec. Indus. Col, Ltd. V. Zenith Radio Corp.*, 475 U.S. 574, 586 (1986). If the nonmoving party fails to make a sufficient showing of the existence of a genuine issue of material fact, then the moving party is entitled to a judgment as a matter of law. *Celotex*, 477 U.S. at 323.

B. The Proceeds from the Sale of the Transported Property

At issue is whether or not Trustee's powers as a hypothetical lien creditor render his interest in personal property belonging to Debtor superior to all other interests.[5] Trustee's argument is twofold: First, the Andersons' lien was extinguished when the Memorabilia seized by Sheriff left Tompkins County; and second, as a hypothetical lien creditor, Trustee possesses the rights of a Pennsylvania lien creditor with an interest superior to all others in the Memorabilia sold in Pennsylvania.

It is uncontroverted that the Andersons recovered a money judgment that they sought to enforce pursuant to Article 52 of the C.P.L.R. In order to enforce their judgment, the Andersons delivered the Execution to Sheriff on January 15, 2004. C.P.L.R. § 5202(a). Under N.Y. law, a lien attaches to personal property upon delivery of the execution. *Knapp v. McFarland*, 462 F.2d 935, 938 (2nd Cir. 1972) (interpreting New York law); *Art-Camera-Pix, Inc. v. Cinecom Corp.*, 315 N.Y.S.2d 991, 992 (N.Y. Sup. Ct. 1970) ("The lien comes into existence only upon issuance of execution to the Sheriff."); *see also* C.P.L.R. § 5202(a). Pursuant to the C.P.L.R., the Execution directed Sheriff to levy on personal property of Debtor. C.P.L.R. § 5230. The C.P.L.R. directs that a sheriff has 60 days within which to levy on personal property. C.P.L.R. § 5230(c). Sheriff tagged the Memorabilia at Debtor's office on January 30, 2004 and subsequently removed some of the Memorabilia on or about March 2, 2004 and some on May 11, 2004. Sheriff's initial act of tagging the Memorabilia was sufficient to levy, as actual removal of the property was not necessary. *See Sheridan Farms, Inc. v. Federico*, 48 Misc. 2d 599 (N.Y. App. Term 1965) (holding that removal is not necessary to effect levy).

[5] The personal property sold in Pennsylvania has now been replaced by the money realized from the sale. As a result, the dispute is over who has the superior right to the proceeds from the sale of the personal property.

For the purposes of this motion, Trustee assumes the validity of the judgment and related Execution and does not dispute that a lien attached to the Memorabilia.[6] Trustee asserts that the transport of the Memorabilia outside Tompkins County, the jurisdiction in which Sheriff has authority to act, served to extinguish Andersons' lien.

New York law provides the jurisdictional basis for a sheriff to act within his or her county. N.Y. County Law § 650 (2008). Under common law, the sheriff's jurisdiction ends at the county line. *See generally*, 85 N.Y. Jur. 2d Police, Sheriffs, Etc. § 109 (2008). Sheriff acted within his county jurisdiction by levying on the Memorabilia. The parties recognized that due to the specialized nature of the Memorabilia being sold, a sheriff's sale in Tompkins County would not realize the highest fair market value of the property. The parties have not cited nor has the court independently found any authority indicating that liens attached to personal property pursuant to a levy are extinguished as a matter of law if, pursuant to court order, the personal property is transported for the conduct of a sale outside of the county or state. This court finds that the limitation of a sheriff's authority to serve process, execute and levy on property within his or her county does not concomitantly extinguish a lien on personal property as it leaves the sheriff's county jurisdiction.

Trustee invokes his rights as hypothetical lien creditor under Code § 544.[7] The Second Circuit has explained that the trustee's advantage "…derives not from the Bankruptcy Code but,

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[6] Trustee expressly reserves the right to later challenge the underlying validity of the Andersons' Judgment on grounds which include the alleged usurious nature of the loans, which, if successful, would invalidate the execution. These issues await another day. Trustee's Memorandum of Law in Support of Defendant's Motion for Partial Summary Judgment at 3 n.3 (D.N. 109).

[7] Code § 544 grants the trustee "[A]s of the commencement of the case…the rights and powers of…

> (1) a creditor that extends credit to the debtor at the time of the commencement of the case, and that obtains, at such time and with respect to such credit, a judicial lien on all property on which a creditor on a simple contract could have obtained such a judicial lien, whether or not such creditor exists…

rather, from the relevant state law defining creditor rights….*Section 544(a)(1)* thus puts the trustee in the position of an ideal lien creditor, armed with a judgment and with all the power that state law confers on such ideal creditors." (citations omitted). *Musso v. Ostashko*, 468 F.3d 99, 106 (2nd Cir. 2006).

To determine the rights Trustee possesses as a result of his status as a hypothetical lien creditor, the court looks to state law to define lien creditor rights and priorities. *See In re Kors*, 819 F.2d 19, 22 (2nd Cir. 1987). As stated by the United States Supreme Court:

> Property interests are created and defined by state law. Unless some federal interest requires a different result, there is no reason why such interests should be analyzed differently simply because an interested party is involved in a bankruptcy proceeding. Uniform treatment of property interests by both state and federal courts within a State serves to reduce uncertainty, to discourage forum shopping, and to prevent a party from receiving 'a windfall merely by reason of the happenstance of bankruptcy.'

Butner v. United States et al., 440 U.S. 48, 55 (1979) (citing *Lewis v. Manufacturers National Bank*, 364 U.S. 603, 609). Thus, the first inquiry is whether Pennsylvania law would recognize a lien in favor of an executing Pennsylvania judgment creditor on personal property transported into Pennsylvania for the sole purpose of sale pursuant to a New York court order. If so, the court must then determine whether the Pennsylvania creditor's resulting lien has priority over the New York judgment creditor's lien intended to be satisfied by the New York court-approved sale.

In answering the question, the Andersons rely primarily on *Somerset Coal Company v. Diamond State Steel Company* for the proposition that a Pennsylvania creditor would not be able

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(2) a creditor that extends credit to the debtor at the time of the commencement of the case, and obtains, at such time…an execution against the debtor that is returned unsatisfied at such time…
(3) a bona fide purchaser of real property, other than fixtures, from the debtor…that obtains the status of a bona fide purchaser at the time of the commencement of the case…"

Code § 544(a).

to attach personal property sent into Pennsylvania under the order of a foreign court. 224 Pa. 217 (Pa. 1909). In *Somerset*, a Pennsylvania corporation had obtained a judgment against a Delaware corporation and served a writ of attachment in Pennsylvania upon the Philadelphia Warehouse Company as garnishee. The Delaware corporation went into receivership under the jurisdiction of a Delaware court. The receivers placed money into the hands of the Philadelphia Warehouse Company in compliance with an order of the Delaware court. In a priority dispute between the Pennsylvania judgment creditor and the receivers, the Pennsylvania Supreme Court held that the "money thereafter continued to be property of the receivers, and as such was exempt from attachment here [in Pennsylvania] as it would have been had it remained in Delaware." *Somerset*, 224 Pa. at 222-3. The Pennsylvania Supreme Court further held that "[c]omity in such cases prevails to exempt the property from attachment in a foreign jurisdiction, when taken there under the authority from the proper court." *Id*. at 223.

Andersons argue that for purposes of transporting properly levied-upon property, there is no meaningful difference between a receiver and a sheriff, as each is an agent and custodian of the court. Both New York and Pennsylvania view receivers as officers of the court. *See Jamaica Savings Bank v. Florizal Realty Corp.*, 95 Misc. 2d 654, 657 (N.Y. Sup. Ct. 1978) ("Furthermore, the office of receiver is one of trust, for not only is the receiver an officer of and an arm of the court…holding the receivership property *in custodia legis*."); *Pearson Mfg. Co. v. Pittsburgh Steamboat Co.*, 309 Pa. 340, 345 ("The legal status of a receiver, his authority and duty, is clear. He is 'the officer, the executive hand, of a court of equity.'") (Pa. 1932). New York and Pennsylvania likewise view sheriffs as officers of the court. *See* N.Y. County Law § 650 (Consol. 2008) ("The sheriff shall perform the duties prescribed by law as an officer of the court…"); *In re Garner et ux.*, 10 F.Supp. 380, 382 (D. Pa. 1935) ("A sheriff is an officer of the

state court under duty to execute its process.") Although no case has been found indicating how a Pennsylvania Court would view a New York sheriff bringing levied-upon property into Pennsylvania for sale, it is instructive that in both New York and Pennsylvania, a sheriff is similar to a receiver to the extent that each is an officer of the court.

Trustee argues that *Somerset* is antiquated and no longer applicable because trustees now perform the duties previously relegated to receivers. Trustee relies upon *Nazareth Cement Company v. Union Indemnity Company* to support his position that the holding in *Somerset* has been abrogated. 116 Pa. Super. 506 (Pa. Super. Ct. 1935) ("…receivers have no rights or powers outside the jurisdiction of the court of their appointment, except as a matter of comity, and that comity will not be extended when so doing would result in prejudice to Pennsylvania creditors.") However, the Superior Court of Pennsylvania later held in *Arroyo v. Chesapeake Insurance Company* that "[t]o the extent that [*Nazareth* permits] the title of a foreign statutory successor to be subordinated to the liens of local creditors acquired after his appointment, [it is] overruled." 209 Pa. Super. 174, 178 (Pa. Super. Ct. 1966).

The line of cases from *Nazareth* to *Arroyo* demonstrates how the doctrine of comity has, over time, influenced decisions in Pennsylvania regarding receiverships, with the end result that local creditors are not favored over foreign receivers. The Supreme Court of Pennsylvania explained the developing doctrine as follows:

> The rule providing that local creditors should be given preference over all other creditors should not be expanded or extended. It will only build new barriers between states—barriers built with planks of inequality. Government in all its branches has been attempting in many ways to destroy this type of barrier. The Legislatures attempt it through reciprocal and uniform state laws, and by the work of the Council of State Government….Even the judicial branch, by continued expansion of the meaning of interstate commerce, and in other ways, is opening gates through state barriers. The desirable features of individual state sovereignty can best be maintained in this country by avoiding the unnecessary and unreasonable consequences of such sovereignty.

Commonwealth v. Consolidated Indemnity and Insurance Company, 362 Pa. 561, 574 (Pa. 1949).

The Andersons argue that once Sheriff levied on the Memorabilia, it was taken under custody of the law, or *in custodia legis*. The term is generally defined as: "In the custody of the law….The phrase is traditionally used in reference to property taken into the court's charge during pending litigation over it." Black's Law Dictionary 783 (8th ed. 1999). Generally, property *in custodia legis* is not subject to execution. "The reason for the immunity of property in custodia legis is that to permit attachment or execution on it by others would require a public officer to appear and defend a multitude of actions regarding the right to possession and would cause confusion and delay the execution of legal process." 30 Am. Jur. 2d Executions § 164. The Pennsylvania Supreme Court has described the doctrine of *in custodia legis* thus:

> [T]he rule is that the court which first acquires jurisdiction of specific property by the possession thereof, or by the commencement of a suit from which it appears that it is necessary to a determination of the controversy, or to the enforcement of the prospective judgment or decree, for the court to have control and dominion over the property, thereby withdraws it from the jurisdiction of every other court so far as is necessary to accomplish the purpose of the suit, and the court is entitled to retain such control as is requisite to effectuate its final judgment or decree free from the interference of every other tribunal. 'That res is as much withdrawn from the judicial power of the other [court], as if it had been carried physically into a different territorial sovereignty.'

Thompson v. FitzGerald, 329 Pa. 497, 505-6 (Pa. 1938) (citing *Covell v. Heyman*, 111 U.S. 176, 182) (brackets in the original). Applying this standard would indicate that the possession of the personal property by the New York court continued into Pennsylvania, and was therefore beyond the reach of Pennsylvania creditors, as if the property had remained in New York for sale.

In a case similar in principle to the one *sub judice*, the Pennsylvania Supreme Court honored a New York court's authority to distribute the property of a trust which had traveled into Pennsylvania. *See Cronin's Case*, 326 Pa. 343 (Pa. 1937). There, a New York testatrix had left

a testamentary trust for the support of a beneficiary in a Pennsylvania hospital. After the New York trustee received the property, the Commonwealth of Pennsylvania made a demand for payment of its maintenance charge. The trustee commenced proceedings in New York and the Commonwealth of Pennsylvania subsequently commenced proceedings in Pennsylvania. The Supreme Court of Pennsylvania held that it is "immaterial that the trust property was brought into this Commonwealth, because it remained subject to distribution by the New York court. That court retained control of the trustee and of the administration of the trust; the trustee must there account for the remainder of the trust property not consumed." *Cronin's Case*, 326 Pa. at 350.

In light of the foregoing, this court finds that a Pennsylvania Court would determine that personal property brought into Pennsylvania for the purpose of sale pursuant to an out-of-state enforcement proceeding would not be subject to attachment by a Pennsylvania creditor.[8] Accordingly, the portion of Trustee's Motion declaring his interest in the proceeds of the sale of personal property in Pennsylvania superior to all other interests is denied.

C. The Manos Note

Trustee claims that his interest in the Manos Note and underlying debt, which arose pursuant to various sections of the Bankruptcy Code as of the petition date, are superior to the Andersons' interest.[9] Under Trustee's theory, his superior rights allow him to exercise his avoidance powers to bring the proceeds from the sale of the Assignment back into Debtor's bankruptcy estate. Andersons respond by claiming they obtained a valid lien, superior to the interests of all other judgment creditors, when they served the Execution on Sheriff on January

[8] Trustee argues that Andersons needed to register their judgment in Pennsylvania in order to proceed with sale. Since the court finds that the property remained *in custodia legis*, the need to register the judgment in Pennsylvania never arises and the issue of the effect of the Andersons' failure to register is never reached.

[9] As a basis for his assertion that his interest in the Manos Note, underlying debt, and proceeds from the sale are superior to Andersons' interest, the Trustee cites 11 U.S.C. §§ 541, 544, 547, and 549.

15, 2004. According to the Andersons, because they delivered their Execution to Sheriff first, no other judgment or execution creditor, including Trustee, could obtain an interest in Debtor's property superior to theirs.

As noted above, a party's interest in property is defined by state law. *Butner*, 440 U.S. at 55. Since the property rights in question arose in New York, New York law will control.

1. Avoidance of Andersons' Interests

Andersons' lien on Debtor's personal property arose upon service of the Execution on Sheriff on January 15, 2004. *Knapp*, 462 F.2d at 938; *see also* C.P.L.R. 5202(a). However, the nature of the personal property, a debt evidenced by a negotiable instrument, complicates the analysis of the parties' rights due to the fact that the Note is a physical, tangible piece of property, and the underlying debt is not. The facts of this case appear to present a matter of first impression, although New York caselaw and the C.P.L.R. provide some guidance.

Under New York law, once a judgment creditor's lien arises pursuant to service of the writ of execution on the sheriff, the creditor has 60 days from the issuance of the execution to levy on the judgment debtor's property. C.P.L.R. § 5230(c). If the creditor does not levy on any of the judgment debtor's property within the 60-day period, the execution is returned and the lien is extinguished as a matter of law. *Marine Midland Bank – Central v. Gleason*, 62 A.D.2d 429, 436 (4th Dept. 1978); *see also* C.P.L.R. § 5230(c). However, the judgment creditor may extend the life of the execution and the lien by 60 days once as a matter of right. C.P.L.R. §5230(c). The time may be further extended unless another execution has intervened. *See* C.P.L.R. § 5230(c).

Andersons had until March 18, 2004 to levy on Debtor's property.[10] On March 8, 2004, Andersons extended the life of their Execution as a matter of right by 60 days. Thereafter, the Andersons preserved their Execution indefinitely by court order.[11]

The C.P.L.R. creates two distinct ways to levy upon personal property. C.P.L.R. § 5232. Because the note, which C.P.L.R. § 5201(c)(4) treats as "property capable of delivery," was lost, Andersons were unable to levy on the Note by having Sheriff seize the actual Note. *Id.*; *see also* C.P.L.R. § 5232(b). Instead, Andersons would have had to levy on the underlying debt, which C.P.L.R. § 5232(a) treats as "property not capable of delivery," by instructing Sheriff to serve a copy of the execution on the garnishee, who is Manos in this case. *Id.* ("The Sheriff…shall levy upon any…debt owed to the judgment debtor or obligor, by serving a copy of the execution on the garnishee…. A levy by service of execution is effective only if, at the time of service, the person served owes a debt to the judgment debtor….). Andersons failed to levy on the underlying debt in this manner because they never served the execution on Manos.

Article 52 of the C.P.L.R. provides a statutory road map for money judgment creditors to pursue, in an orderly manner, the ultimate remedy for enforcement of their rights—receipt of

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[10] March 18, 2004 is 60 days from January 15, 2004, the date Andersons served their Execution on Sheriff.

[11] Andersons obtained subsequent orders extending the life of the execution from the Tompkins County Supreme Court on April 22, 2004, September 17, 2004, January 31, 2005, and finally on February 9, 2005. The February 9 order states:

> [I]t is hereby ORDERED, that the execution served on the Sheriff of Tompkins County by or on behalf of Stuart and Joan Anderson against Andrew LaVigne on January 14, 2004, continued on March 8, 2004 (the "Execution"), and further continued by Order of this court dated April 22, 2004, and by Order to Show Cause of this Court dated September 17, 2004, is hereby extended until the earlier of (a) 30 days after the date the bankruptcy case denominated In re Andrew N. LaVigne, Case No. 04-64078-6-SDG, filed in the United States Bankruptcy Court, Northern District of New York is closed, (b) 30 days after the date that any order or judgment of the Bankruptcy Court or other court of competent jurisdiction becomes final which finds that the execution creates a lien on property of Andrew LaVigne or the bankruptcy estate and is not subject to set aside, challenge or avoidance for any reason; or (c) the date that any order or judgment of the Bankruptcy Court becomes final which determines that Stuart and Joan Anderson have no lien rights against any property of Andrew LaVigne or his bankruptcy estate, or ultimately settles the rights of Stuart and Joan Anderson without continuation of the Execution….

money to satisfy their judgments—while at the same time insuring due process for debtors. The requirement that a levy upon property not capable of delivery be served upon the garnishee puts the garnishee, in this case, Manos, on notice not to pay the obligee (Debtor), or any other third party claiming the right to be paid, or Manos could suffer the risk of paying the obligation twice. It is apparent that Manos had notice of the Sheriff's sale because he showed up at the sale and was the successful bidder. Here, where Manos is the party who steps forward to purchase the obligation and is the very party from whom one is to collect the debt, no ostensible purpose is served by a rigid insistence that the judgment creditor first effect a levy by serving Manos with a copy of the Execution prior to sale. The court finds the C.P.L.R. has the necessary fluidity to permit this conclusion. A contrary conclusion would only serve to frustrate a judgment creditor who has acted assiduously.

Trustee asserts that his powers under the strong-arm provision of the Bankruptcy Code allow him to avoid any unperfected lien on a debtor's property as of the petition date. *See* 11 U.S.C. § 544(a). He relies on the case of *In re Burton Flax* for the proposition that Trustee's status of a hypothetical judgment lien creditor gives him priority over any unperfected lien as of the filing of the bankruptcy petition. 179 B.R. 408, 412 (Bankr. E.D.N.Y. 1995). Trustee, however, fails to recognize the line of cases that discusses the issue of whether Trustee's powers under Code § 544 allow him to avoid an execution lien that arose under New York law prior to his interest and has not been perfected by levy as of the petition date. *See In re Cosmopolitan Aviation*, 34 B.R. at 595; *In re Marceca*, 129 B.R. 369 (Bankr. S.D.N.Y. 1991); *In re Syed Industries Corp.*, 58 B.R. 920 (Bankr. E.D.N.Y. 1986); *see also In re Sid Bernstein*, 1996 Bankr. LEXIS 393 (Bankr. E.D. Pa. 1996); *but see In re Flax*, 179 B.R. at 412.

A multiplicity of courts has looked to the provisions of the C.P.L.R. to determine exactly what interests a trustee gains with his strong-arm powers. Sections 544(a)(1) and (2) allow Trustee to step into the shoes of a "hypothetical" judgment lien creditor or execution creditor who did not levy on any of a debtor's property. 11 U.S.C. § 544(a); *see* statute cited *supra* note 7. While this power may be wide-reaching, it has its limits. For instance, Code § 544 does not grant Trustee the rights of a bona fide purchaser of personalty. *See* 11 U.S.C. § 544(a); *In re Cosmopolitan Aviation Corp.*, 34 B.R. at 595.

Under C.P.L.R. section 5202(a), an execution creditor has a claim superior to claims of all other transferees except for transferees who obtained their interests for fair consideration. C.P.L.R. §5202(a). Since Trustee never gained the status of a purchaser of personalty for fair consideration, he does not gain priority over a prior execution creditor under section 5202(a), and therefore cannot avoid a prior execution lien based on this section.[12]

At most, Trustee has a claim as an execution creditor as of the petition date, June 4, 2004. C.P.L.R. section 5234(b) discusses priority among competing execution creditors.[13] Only one Tompkins County Sheriff's Office exists in Tompkins County, New York. Therefore, only the

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[12] Code section 544(a)(3) gives a trustee the status of a "hypothetical" bona fide purchaser of real property, but does not extend that status to personalty. 11 U.S.C. § 544(a)(3); (*see* statute cited *supra* note 6).

[13] Section 5234(b) states:

> Priority among execution creditors. Where two or more executions or orders of attachment are issued against the same judgment debtor or obligor and delivered to the same enforcement officer or issued by the support collection unit designated by the appropriate social services district, they shall be satisfied out of the proceeds of personal property or debt levied upon by the officer or by the support collection unit in the order in which they were delivered…. Where two or more executions or orders of attachment are issued against the same judgment debtor or obligor and delivered to different enforcement officers, and personal property or debt is levied upon within the jurisdiction of all of the officers, the proceeds shall be first applied in satisfaction of the execution or order of attachment delivered to the officer who levied, and thereafter shall be applied in satisfaction of the executions or orders of attachment delivered to those other officers who, before the proceeds are distributed, make a demand upon the officer who levied….

C.P.L.R. §5234(b).

first clause in section 5234(b) applies here. Under the clause, the first creditor who serves his execution on the sheriff obtains an execution lien superior to the lien of any creditor who subsequently serves his execution against the same judgment debtor on the same sheriff. *Beef & Bison Breeders, Inc. v. Capitol Refrigeration Co.*, 431 N.Y.S.2d 986, 988 (N.Y. Sup. Ct. 1980) ("It is not necessary for priority purposes that the Sheriff or enforcement officer levy under the first execution before the delivery of or levy upon a second or subsequent execution. If the levy is made under a junior execution and the judgment debtor's property is sold, the judgment creditor who first delivered a [sic] execution does not lose his priority.") Based on the prior service of the Execution on Sheriff, Andersons have priority over any lien a judgment creditor could have obtained by serving an execution on Sheriff on the petition date of June 4, 2004. Therefore, Trustee may not avoid Andersons' execution lien by using the status afforded him under section 544 of the Bankruptcy Code.

Trustee also claims that the transfer of $100,000.00 by Manos to the Andersons pursuant to the sale of the Manos Note is a voidable preference under section 547 of the Bankruptcy Code. Under the facts of this case, Andersons' lien in Debtor's property arose on January 15, 2004, which is well outside the 90-day preference window. Accordingly, for purposes of this record, the Andersons had a secured claim, negating elements essential to finding a preference, namely that there was a transfer which allowed the Andersons to receive more than they would have received in a "hypothetical" chapter 7 case. *See* 11 U.S.C. § 547. Since Trustee has reserved for another day arguments which further challenge the Andersons' secured position , the ultimate outcome of Trustee's 547(b) claim is deferred until further proceedings.

Trustee also asserts that the transfer of the proceeds from the sale of the Assignment by Sheriff to Andersons constitutes a voidable post-petition transfer under Code § 549 ("§ 549

claim") because (1) Sheriff did not pay the sale proceeds to the Andersons until after the petition date, and (2) Sheriff did not deliver an assignment of the mortgage securing the debt to Manos until after the petition date. Even if Debtor retained a residual interest as to any equity that might exist in the Assignment after its sale and application to Andersons' lien, Andersons' lien was superior to Debtor's and Trustee's interest and the court finds no reason, on the present record, to disturb the sale. However, due to Trustee's reservation of rights, Trustee's § 549 claim is preserved for consideration in connection with further proceedings.

2. Sale of the Assignment and Sheriff's Poundage

Trustee asserts that since Andersons did not levy on the Note or underlying debt by taking steps set forth in C.P.L.R. § 5232, Sheriff's sale of the Assignment is void and, therefore, Sheriff is not entitled to the $5,000.00 poundage he received from the sale.

Under C.P.L.R. § 5233, a sheriff may hold a public auction to sell any interest a judgment debtor has in personal property. *Id.* In order to hold the sale, the property must come into the hands of the sheriff pursuant to an execution or order. *Id.* The statute does not require the sheriff to levy on the property in order to hold the sale. Under C.P.L.R. § 5209, a person, pursuant to an execution, may voluntarily pay over money or deliver property in which the judgment debtor has an interest to the sheriff. *Id.* It follows that the sheriff may then sell that property at a public auction pursuant to C.P.L.R. § 5233. In this case, Debtor voluntarily executed the Assignment and turned it over to the Andersons. Andersons then gave the Assignment to Sheriff with instructions to sell pursuant to the Execution.

Sheriffs are entitled to poundage fees in connection with public sales under C.P.L.R. § 8012(b). *Id.* Under this section, sheriffs are entitled to "…five percent upon the first two hundred fifty thousand dollars collected…." *Id.* The Court finds on the present record that

Sheriff is entitled to the $5,000.00 in poundage that he retained from the sale, which represents five percent of the total sale price of $100,000.00. Notwithstanding Trustee's assertion that the sale is void, he has not provided supporting authority for, nor has the court independently found, any reason to invalidate the sale.

In accordance with the foregoing, the portion of Trustee's Motion seeking judgments of $100,000.00 against the Andersons and $5,000.00 against Sheriff is denied on the present record without prejudice to the rights reserved by Trustee on other issues to be tried in this proceeding.

Dated: April 28, 2008
Syracuse, New York

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Hon. Margaret Cangilos-Ruiz
U.S. Bankruptcy Judge