UNITED STATES BANKRUPTCY COURT
MIDDLE DISTRICT OF GEORGIA
THOMASVILLE DIVISION

IN RE:

SUWANNEE SWIFTY STORES, INC., CASE NO. 96-60807

EIN: 58-0434460, CHAPTER 11

DEBTOR.

MEMORANDUM OPINION

On February 14 and 15, 2000, the court held a hearing on Debtor's objection to claim number 302 of McLane Company, Inc. (McLane) and McLane's response to the objection. At the conclusion of the evidence and argument, counsel for McLane asked for and was given an opportunity to submit a brief. Debtor and the Official Committee of Unsecured Creditors filed briefs in response. The court has considered all the briefs filed, the evidence, the argument of counsel, and the applicable statutory and case law. The court will sustain Debtor's objection based on the following findings of fact and conclusions of law.

FACTS

Most of the relevant facts have been stipulated by the parties in Document number 1548. In addition to those facts, the court finds by a preponderance of the evidence that McLane knew Debtor was not paying other suppliers' bills as they became due, at least as early as June 1996. The court finds

overwhelming evidence that McLane knew this by November 1996. McLane was keeping a close watch on Debtor to make sure it paid McLane within, or close to, contractual terms. The evidence established that this close watch was based on McLane's knowledge that other suppliers were not being paid on time and also that McLane's older bills were not being paid.

The court also finds that McLane voted in favor of Debtor's plan. Document number 918 is McLane's ballot accepting the plan. The plan incorporates the disclosure statement, which clearly says that there is no provision in the plan to pay reclamation claims. The court finds that McLane could have objected either to the disclosure statement or to the plan incorporating the disclosure statement, but McLane did neither. Instead, McLane voted in favor of the plan, which was confirmed. See Doc. no. 993 (Order Confirming the Plan).

DISCUSSION

In order to withstand Debtor's objection to its claim, McLane has the burden of proof of establishing by a preponderance of the evidence that it is entitled to reclamation under § 546(c)[1] of the Bankruptcy Code ("Code").

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[1] Section 546(c) of the Code provides:

> (c) Except as provided in subsection (d) of this section, the rights and powers of a trustee under sections 544(a), 545, 547, and 549 of this title are subject to any statutory or common-law right of a seller of goods that has sold goods to the debtor, in the ordinary course of such seller's business, to

McLane failed to carry its burden as to several aspects of its case.

First, the court finds that Official Code of Georgia Annotated ("O.C.G.A.") § 11-2-702[2] does require that a creditor

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> reclaim such goods if the debtor has received such goods while insolvent, but–
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> (1) such a seller may not reclaim any such goods unless such seller demands in writing reclamation of such goods–
>
> (A) before 10 days after receipt of such goods by the debtor; or
>
> (B) if such 10-day period expires after the commencement of the case, before 20 days after receipt of such goods by the debtor; and
>
> (2) the court may deny reclamation to a seller with such a right of reclamation that has made such a demand only if the court–
>
> (A) grants the claim of such a seller priority as a claim of a kind specified in section 503(b)of this title; or
>
> (B) secures such claim by a lien.

11 U.S.C. § 546(c)(as amended 1994).

[2] O.C.G.A. § 11-2-702 provides in part:

> (2) Where the seller discovers that the buyer has received goods on credit while insolvent he may reclaim the goods upon demand made within ten days after the receipt, but if misrepresentation of solvency has been made to the particular seller in writing within three months before delivery the ten-day limitation does not apply. Except as provided in this subsection the seller may not base a right to reclaim goods on the buyer's fraudulent or innocent misrepresentation of solvency or of intent to pay.
>
> (3) The seller's right to reclaim under subsection (2) of this Code section is subject to the rights of a buyer in ordinary course or other good faith purchaser or lien creditor under this article (Code Section 11-2-403). Successful reclamation of goods

establish that it discovered a debtor's insolvency within the ten days following delivery of the goods. The language of the statute is clear that lack of knowledge of insolvency is an element of a reclamation claim under Georgia law. The seller must discover that the buyer received goods while insolvent. This necessarily means that the seller did not know the buyer was insolvent when it shipped the goods. See In re Haugabook Auto Co., Inc., 9 U.C.C. Rep. Serv. 1095 (M.D. Ga. 1971) (Bootle, C.J.). In Haugabook Auto, the court found no error in reading a reliance requirement into Ga. Code Ann. § 109A-2-702, the precursor to O.C.G.A. § 11-2-702. The court stated:

> It is a well settled principle of law that one charging fraud against another must prove reliance on the fraudulent act alleged to have been committed before any recovery is authorized. The Comments to the Official Text on the Uniform Commercial Code (Comment 2) in referring to what is Ga. Code Ann. § 109A-2-702 indicates the close relationship of that code section to the general fraud remedies long recognized in law. . . . A seller who knows of the buyer's insolvency or knows that the buyer misrepresented his solvency, and who nevertheless engages in credit transactions with the buyer, is in no position to complain.

Haugabook Auto, 9 U.C.C. Rep. Serv. at 1096.

In this case, the evidence established that McLane knew by

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excludes all other remedies with respect to them.

O.C.G.A. § 11-2-702(2), (3) (1994). The Florida Statute dealing with reclamation is substantively identical to the Georgia statute except that it does not contain the words "or lien creditor" in subsection (3). See FLA. STAT. ANN. § 672.702 (1993).

June 1996 that Debtor was insolvent under the U.C.C. in the sense that it was not paying its bills as they came due. Therefore, McLane cannot satisfy the Georgia statutory test for reclamation and is not entitled to reclaim under § 546(c) of the Code.

Second, McLane failed to carry its burden to identify and quantify what goods from the previous ten days' deliveries were still in Debtor's stores on the date of demand. See Flav-O-Rich, Inc. v. Rawson Food Serv., Inc. (In re Rawson Food Serv., Inc.), 846 F.2d 1343, 1344 (11th Cir. 1988) ("We conclude that an implicit requirement of a § 546(c) reclamation claim is that the debtor must possess the goods when the reclamation demand is made and therefore that the seller must prove possession as part of its prima facie case."). It may be possible for a creditor to carry its burden in this regard by proof of industry standards for turns of particular items. See Rawson Food Serv., 846 F.2d at 1350 n.11 ("There is support in the cases that the court can look to evidence of the normal turnover time of goods to determine whether the goods remained in the debtor's possession as of the reclamation demand. See In re Landy Beef Co. Inc., 30 B.R. at 21.").

However, that burden was not carried in this case. It is certainly likely that a large amount of goods delivered within the preceding ten days remained in the stores on the date of demand. Unfortunately for McLane, under the evidence

presented, it is impossible to quantify that amount. McLane's controller of its Georgia division made an effort to take industry data and apply it only to the Georgia stores in order to come up with a percentage of goods remaining for all of the Georgia and Florida stores. This simply left the quantity too indefinite. Therefore, McLane also cannot satisfy this prong of § 546(c) even if it could pass muster under the Georgia statutory requirements for reclamation.

Third, the parties stipulated that NationsBank (now Bank of America) had a blanket lien on Debtor's inventory that exceeded the value of its inventory at the date of demand (which was the same day as the date of filing). However, McLane could possibly prevail if it could require NationsBank to marshal and look to other collateral for payment in full of its secured claim. See In the Matter of Leeds Bldg. Prods., Inc., 141 B.R. 265, 270 (Bankr. N.D. Ga. 1992) (holding that a seller may have a right to reclaim notwithstanding a secured creditor with priority if the seller can show the right to reclaim would have some value outside of bankruptcy).

McLane's argument in this regard might be well taken if McLane had filed an adversary proceeding joining NationsBank as a party. Here, however, we merely have an objection to claim involving no parties other than Debtor and McLane. Therefore, the court cannot order NationsBank to marshal.

In this court's opinion, it is a close call whether

McLane, as an unsecured creditor, can invoke marshaling against a secured creditor. A recent decision, Galey & Lord Inc. v. Arley Corp. (In re Arlco, Inc.), 239 B.R. 261 (Bankr. S.D.N.Y. 1999), holds that only a secured creditor can invoke marshaling under circumstances very similar to the facts in this case. However, Judge Cotton in In re Maddox, 84 B.R. 251, 258 (Bankr. N.D. Ga. 1987), allowed a party who was not a creditor at all but who had an interest in part of the debtor's property to utilize the doctrine. This court is inclined to follow the reasoning in Maddox. However, the point is academic in this case because NationsBank has not been joined in this action.

Finally, as discussed in the court's fact findings, McLane voted for Debtor's plan which incorporated the disclosure statement's mandate that no reclamation claims were provided for in the plan. McLane is now bound by this language in the confirmed plan.

The Eleventh Circuit discussed the preclusive effect of an order confirming a chapter 11 plan in Wallis v. Justice Oaks II, Ltd. (In re Justice Oaks II, Ltd.), 898 F.2d 1544 (11th Cir. 1990). The court stated:

> Claim preclusion applies to an order or judgment when four conditions are satisfied. First, the prior judgment must be valid in that it was rendered by a court of competent jurisdiction and in accordance with the requirements of due process. Second, the judgment must be final and on the merits. Third, there must be identity of both parties or their privies. Fourth, the later proceeding must involve the same cause of action as involved in the earlier

proceeding.

Id. at 1550 (citations omitted).

All four elements are satisfied in this case. First, there has been no challenge to the court's jurisdiction or to the procedure followed in confirming Debtor's plan. Second, it is well established that a bankruptcy court's order of confirmation is entitled to the same effect as any district court final judgment on the merits. Id. Third, Debtor and McLane were parties to the confirmation proceeding and McLane had an opportunity to object to its treatment during that proceeding. Fourth, McLane's reclamation claim is based on the same transaction that gave rise to its treatment in the plan. Therefore, because the four requirements for claim preclusion are met in this case, the confirmation order is a complete bar to McLane's reclamation claim. See Sanders v. GIAC Leasing Corp. (In re Sanders), 81 B.R. 496, 498 (Bankr. W.D. Ark. 1987) ("An order confirming a chapter 11 plan from which there is no appeal is generally regarded as an order that is entitled to full faith and credit by other courts and is res judicata as to all questions pertaining to such plan which were raised or could have been raised.").

CONCLUSION

The facts and the law in this case do not allow for McLane's reclamation claim against Debtor. Accordingly, McLane's total claim of $807,466 (as stipulated at ¶58 of Doc.

no. 1548) will be allowed as unsecured. Debtor's objection will be sustained.

An order in accordance with this Memorandum Opinion will be entered.

DATED this 22nd day of March 2000.

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JOHN T. LANEY, III
UNITED STATES BANKRUPTCY JUDGE